86-573

Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THAN TUN, M.D., AND THIDA SWE TUN,
Petitioners,
vs.
KAUIKEOLANI CHILDREN'S HOSPITAL,
a Hawaii nonprofit corporation, now
known as KAPIOLANI WOMEN AND CHILDREN'S
MEDICAL CENTER, a Hawaii nonprofit
corporation, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF HAWAII

APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENTS KAUIKEOLANI CHILDREN'S HOSPITAL, KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER RICHARD DAVI, PAUL E. COOK, DR. WALTON K.T. SHIM, AND DR. STANLEY M.K. CHUNG

LIBKUMAN, VENTURA, AYABE & HUGHES

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Kauikeolani Children's Hospital,
Kapiolani Women's and Children's
Medical Center, Richard Davi,
Paul E. Cook, Dr. Walton K.T. Shim,
and Dr. Stanley M.K. Chung

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APPENDIX A
SUPREME COURT OF HAWAII
MEMORANDUM OPINION

NO. 10564

IN THE SUPREME COURT OF THE STATE OF HAWAII

THAN TUN, M.D., AND THIDA SWE TUN,	) CIVIL NO. 84-181
Plaintiffs-Appellants,	) APPEAL FROM THE:) 1) ORDER GRANTING) MOTION FOR SUMMARY
v.	) JUDGMENT AND) DIRECTING ENTRY OF
KAUIKEOLANI CHILDREN'S HOSPITAL, A Hawaii non-profit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al.,	) FINAL JUDGMENT FILED) MARCH 6, 1985,) 2) JUDGMENT FILED) MARCH 6, 1985,) 3) AMENDED ORDER) GRANTING MOTION FOR) SUMMARY JUDGMENT) AND DIRECTING ENTRY
and	) OF FINAL JUDGMENT) FILED APRIL 2, 1985 and
THE QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al.,	) 4) AMENDED JUDGMENT) FILED APRIL 2, 1985)
Defendants.	) FIRST CIRCUIT COURT)
	) HONORABLE EDWIN H. HONDA Judge

MEMORANDUM OPINION

Plaintiffs-appellants Dr. Than Tun and Thida Swe Tun appeal from a grant of summary judgment in favor of defendants-appellees Kauikeolani Children's Hospital now known as Kapiolani Women's and Children's Medical Center (Kapiolani), Richard Davi, Paul E. Cook, Dr. Walter Shim, Dr. Stanley Chung, Dr. Mitsuo Hattori, Queen's Medical Center, Dr. John Pegg, Dr. Dan Yoshioka and Dr. Arthur Sprague. We affirm in part and reverse in part.

I.

Dr. Tun applied for anesthesiology privileges at Kapiolani. Initially, he was granted temporary privileges but those privileges were terminated based on Dr. Hattori's observation of Dr. Tun's performance in the operating room. Dr. Chung, Chief of Surgery, relied on Dr. Hattori's observations and recommended the termination to Mr. Davi, President. Dr. Hattori, Chief of Anesthesiology, had observed Dr. Tun on two occasions and believed his performance to be unsatisfactory. Dr. Tun, stating that he did not desire to use the facilities withdrew his application without pursuing the administrative appeal process as provided under the Medical Staff By-Laws. Kapiolani formally denied Dr. Tun's application, taking the view that Dr. Tun's letter of withdrawal was a waiver of his right to an appeal hearing.

Subsequent to the denial of staff privileges to Dr. Tun by Kapiolani, Dr. Tun applied to Queen's Medical Center for anesthesiology privileges. On the application form, Dr. Tun answered "No" to the question of whether his privileges had ever been revoked, denied or suspended at any other hospital. Dr. Hattori, in responding to Queen's questionnaire, stated that, "I don't believe Dr. Tun is ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology."

Queen's Credentials Committee recommended that Dr. Tun's application for privileges be denied. The Medical Executive Committee affirmed the recommendation and notified Dr. Tun of the denial based on, inter alia, unethical conduct in answering the question improperly. Dr. Tun was advised that he had a right to request an informal hearing before the Medical Executive Committee and a full hearing before the Board of Directors after the hearing and decision by the Medical Executive Committee. A hearing before the Medical Executive Committee was scheduled at the request of Dr. Tun but Dr. Tun failed to attend the hearing. Instead, Dr. Tun commenced action for damages in the circuit court.

Appellants sued Queen's, Kapiolani, and their respective doctors and administrators for monetary damages based on a multiple causes of action, summarized as follows: libel, slander and defamation; improper revocation of privileges; violation of due process; conspiracy to deny Dr. Tun his constitutional rights and to restrict interstate business; intentional infliction of emotional distress; malicious prosecution and abuse of process; breach and tortious breach of contract; negligence; unfair and deceptive trade practices; loss on consortium;

promissory estoppel; and intentional, malicious, wanton and willful acts of defendants. The trial court granted summary judgment in favor of defendants based on Dr. Tun's failure to exhaust the hospitals' administrative remedies. We affirm as to all defendants except Dr. Hattori.

II.

Appellants assert that Dr. Tun is excused from exhausting the available administrative remedies for the following reasons: (1) the administrative review would have been futile and would have caused undue hardship; (2) Dr. Tun was deprived of procedural due process; (3) appellants may sue the peer review committee for damages without exhausting the administrative remedies; and (4) the defendants acted with malice against Dr. Tun under Hawaii Revised Statutes (HRS) §663-1.7(b).[1]

III.

Was Dr. Tun bound to exhaust the administrative remedies available to him? And if so, would the pursuit of administrative appeals have been an act of futility or cause undue hardship?

It is generally accepted that a physician must exhaust available internal remedies afforded by the hospital before bringing a suit for damages. *Westlake Community Hospital v. Superior Court of Los Angeles County*, 17 Cal. 3d. 465, 131 Cal. Rptr. 90, 551 P.2d 410 (1976); *Eidelson v. Archer*, 645 P.2d 171 (Alaska 1982). However, the exhaustion of remedies requirement has been excused where the administrative review process is either inadequate or would be futile to the certainty of an adverse decision. *Eidelson*, *supra*, at 181; *see also Glendale City Employees' Ass'n v. City of Glendale*, 15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609 (1975).

Appellants contend that the available administrative appeal procedure would have been futile since Dr. Tun felt that Queen's had made a prejudgment, and that Queen's did not conduct a sufficient investigation prior to reducing his privileges. It was also apparent that

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[1]The pertinent part of §663-1.7(b) reads:

(b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

Dr. Tun's and Queen's interpretation of the application differed. These contentions by appellants are issues which should have been raised and argued before the Medical Executive Committee and ultimately before the Board of Directors if necessary. Moreover, appellants failed to show by any supporting evidence on the record specifically how or why such an appeal process would have been futile, or how Queen's had already prejudged Dr. Tun. Dr. Tun's personal inclination or views are insufficient grounds to support appellants' contentions.

As to Kapiolani, here again appellants fail to give any specific grounds as to why the administrative appeal process would have been futile or would have put Dr. Tun in undue hardship to pursue his administrative appeal. Instead, appellants asserted that since Dr. Tun withdrew his application, pursuing any administrative remedy was unnecessary. Yet, the record shows that Dr. Tun "withdrew his application" after notice of the termination of his temporary privileges. Therefore, any disagreement with Kapiolani should have been presented at a hearing before an Ad Hoc Committee of the medical staff. Dr. Tun failed to avail himself of this hearing as provided in the By-Laws.

IV.

Was Dr. Tun denied his right to procedural due process?

The decision of a hospital board will be upheld unless the doctor involved was denied procedural due process or the hospital abused its discretion. *Silver v. Castle Memorial Hospital*, 53 Haw. 475, 497 P.2d 564 (1972). Procedural due process requires that a doctor whose privileges are being revoked or who is being denied appointment or reappointment to the medical staff be given an opportunity to appeal the denial at at hearing. Further, the hearing must comport with certain procedural safeguards such as timely notice of hearing and a statement specifying the reasons for the initial decision of the hospital board. *Silver* at 485, 497 P.2d at 571.

Appellants claim that Dr. Tun was denied due process when Kapiolani terminated his temporary privileges without written charges or a proper hearing, but the record indicates that the notification by Kapiolani comported with the procedural due process requirements in *Silver*. Kapiolani notified Dr. Tun that the termination of his temporary privileges was due to two unacceptable anesthetic cases performed by him at the hospital and observed by Dr. Hattori. The notice informed Dr. Tun of his right to request a hearing within

thirty days, and that failure to request a hearing would constitute a waiver of his right to do so.

Although Dr. Tun's privileges were actually terminated prior to hearing, the hospital took such action "in the best interest of patient care." We do not consider this an abuse of discretion by Kapiolani whose physicians and supervisors were in the best position to make a decision for the benefit of their patients.

As to Queen's, appellants claim that Dr. Tun's privileges were denied on the basis of his application rather than his competency. This is a matter within the hospital's discretion. Further, the record shows that Queen's denied Dr. Tun's privileges due to serious questions regarding his ethical conduct. Queen's informed Dr. Tun that they concluded that he had falsified information and specified the ground upon which they had based their conclusion. Queen's further informed Dr. Tun of his right to request a hearing with the Medical Executive Committee and the right to review his own staff file. We find no denial of due process or abuse of discretion here.

V.

Appellants contend that Kapiolani and its named defendants acted with malice. Under HRS §663-1.7(b), Kapiolani and the members of its peer review committee are not liable for acts done in furtherance of the committee's purpose and without malice. This section confers a qualified privilege on the committee members, placing the burden on the plaintiff to adduce clear and convincing proof that the defendant was motivated by malice and not by an otherwise proper purpose. *See Aku v. Lewis*, 52 Haw. 366, 477 P.2d 162 (1970). The by-laws provide similar immunity, excepting acts done in malice and without good faith.

Appellants also contend that Kapiolani failed to investigate the accuracy of Dr. Hattori's report. The action of Kapiolani is relying on the Chief of Surgery's recommendation comports with procedure set down in the by-laws. The accuracy and truth of the report by Dr. Hattori were issues appropriate for an appeal hearing. At the hearing, Dr. Tun would have had the opportunity to present evidence and witnesses in his favor.

Based on the record we find no supporting evidence of malice or lack of good faith on the part of Kapiolani or members of its peer review committees. We conclude that under HRS §663.7(b) [sic] Kapiolani and its named defendants are immune from the civil liabilities claimed by appellants.

VI.

Appellants further contend that Dr. Hattori was motivated by anger and acted with malice in writing a false report. Dr. Hattori is not a member of Kapiolani's peer review committee and therefore he does not fall under HRS §663-1.7(b). We, therefore, hold that the trial court committed error in granting summary judgment in favor of Dr. Hattori solely on the basis of appellants' failure to exhaust the administrative remedies available to them. We remand for proceedings anew on the causes of action claimed by the appellants against Dr. Hattori.

VII.

Appellants' other claims are without merit.

Affirmed in part, reversed in part, and remanded for proceeding not inconsistent with this opinion.

DATED: Honolulu, Hawaii, June 17, 1986.

/S/ Herman Lum
/S/ Edward H. Nakamura
/S/ Frank D. Padgett
/S/ Yoshimi Hayashi
/S/ James H. Wakatsuki

APPENDIX B
JUDGMENT ON APPEAL

NO. 10564

IN THE SUPREME COURT OF THE STATE OF HAWAII

THAN TUN, M.D., AND THIDA SWE TUN,	) CIVIL NO. 84-0181
Plaintiffs-Appellants,	) APPEAL FROM THE:) 1) ORDER GRANTING) MOTION FOR SUMMARY
v.	) JUDGMENT AND) DIRECTING ENTRY OF
KAUIKEOLANI CHILDREN'S HOSPITAL, A Hawaii non-profit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al.,	) FINAL JUDGMENT FILED) MARCH 6, 1985,) 2) JUDGMENT FILED) MARCH 6, 1985,) 3) AMENDED ORDER) GRANTING MOTION FOR) SUMMARY JUDGMENT) AND DIRECTING ENTRY
Defendants-Appellees,	) OF FINAL JUDGMENT) FILED APRIL 2, 1985 and
and	) 4) AMENDED JUDGMENT) FILED APRIL 2, 1985
THE QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al.,	)) FIRST CIRCUIT COURT)
Defendants.	) THE HONORABLE) EDWIN H. HONDA) Judge

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Supreme Court of the State of Hawaii filed June 17, 1986, the judgments appealed from are affirmed as to Defendants-Appellees Kauikeolani Children's Hospital now known as Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walter Shim, Dr. Stanley Chung, Queen's Medical Center, Dr. John Pegg, Dr. Dan Yoshioka and Dr. Arthur Sprague, and reversed and remanded for further proceedings against Defendant-Appellee Dr. Mitsuo Hattori."

DATED: Honolulu, Hawaii, August 19, 1986.

BY THE COURT:
CLERK

APPROVED:
/S/ James H. Wakatsuki
JUSTICE

APPENDIX C
HAWAII CONSTITUTION Art. I §4

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry.

APPENDIX D
HAWAII REVISED STATUTES §663-1.7
HAWAII REVISED STATUTES (1976 Replacement)

§663-1.7 Professional society; peer review committee; no liability; exceptions. (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, the membership of which comprises a majority of the people engaged in the profession or occupation in the area which it serves and a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation; and "peer review committee" or "committee" means a committee created by a professional society, or by the medical staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession or occupation, or in its hospital.

(b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

(c) This section shall not be construed to confer immunity from liability upon professional society or hospital, nor shall it affect the immunity of any shareholder or officer of a professional corporation; provided, however, there shall be no civil liability for any professional society or hospital in communicating any conclusions reached by one of its peer review committees relating to the conformance with professional standards of any person engaged in the profession or occupation of which the membership of the communicating professional society consists, to a peer review committee of another professional society whose membership is comprised of persons engaged in the same profession of occupation, or to a duly constituted governmental board or commission or authority having as one of its duties the licensing of persons engaged in that same profession to a government agency charged with the responsibility for administering a program of medical assistance in which services are provided by private practitioners.

(d) The highest level peer review committee of a medical society, hospital or other health care institution shall report in writing every adverse decision made by it to the board of medical examiners within thirty days after the adverse decision is verified by the committee. Failure to comply with this subsection shall be a violation punishable by a fine of not more than $100 for each member of the committee. [L1970, c60 §1; am L 1975, c 170, §2; am L 1976, c 219, §18]

HAWAII REVISED STATUTES (1983 Supplement)

§663-1.7 Professional society; peer review committee; no liability; exceptions. (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, or specialty within a profession or occupation, a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation or specialty practice; and "peer review committee" or "committee" means a committee created by a professional society, or by the medical or administrative staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession or occupation, or area of specialty practice, or in its hospital.

***

(d) The final peer review committee of a medical society, hospital, or other health care facility shall report in writing every adverse decision made by it to the department of commerce and consumer affairs. The report shall be filed within thirty business days following an adverse decision. The report shall contain information on the nature of the action, its date, the reasons for, and the circumstances surrounding the action; provided that specific patient identifiers shall be expunged. If a potential adverse decision was superseded by resignation or other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state. The department shall prescribe forms for the submission of reports required by this section. Failure to comply with this subsection shall be a violation punishable by a fine not less than $100 for each member of the committee. [am L 1982, c 227, §6; am L 1983, c231, §1; am L 1984, c 168, §16]

APPENDIX E
RULE 56, Hawaii Rules of Civil Procedure

Rule 56. SUMMARY JUDGMENT

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavit; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to

the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. (Amended May 15, 1972, effective July 1, 1972)

APPENDIX F
Rule 28, Hawaii Rules of Appellate Procedure

Rule 28. BRIEFS.

(a) **Format and Service.** All briefs shall conform with Rule 32 and be accompanied by proof service of two copies on each party to the appeal. Except after leave granted, the clerk will not receive an opening or answering brief of more than 35 typewritten pages, or a reply brief of more than 10 typewritten pages, exclusive of indices, appendices and statements of related cases, or any brief which does not conform with Rule 32.

(b) **Opening Brief.** Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

(1) A subject index of the matter in the brief with page references, and a table of authorities listing the cases, alphabetically arranged (with citation to both the official reports and national reporter systems), text books, articles, statutes, treatises, regulations and rules cited, with references to the pages in the brief where they are cited.

(2) A statement showing the grounds on which the jurisdiction of the court has been invoked. It shall include a showing that the appeal is timely by references to the record with dates. In a criminal case it shall indicate the nature of the offense and the statute under which the defendant was convicted, the sentence imposed, and whether the defendant has been released on bail or on his own recognizance.

(3) A concise statement of the case, containing the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of trial proceedings. In presenting those material facts all supporting and contradictory evidence shall be presented in summary fashion and with appropriate record references. There shall be appended to the brief a copy of the findings of fact and conclusions of law, or opinion or decision, if any, unless otherwise ordered by the court.

(4) A concise statement of the points on which appellant intends rely, set forth in separate, numbered paragraphs. Each point shall refer to the alleged error committed by the court or agency upon which appellant intends to rely. The point shall show where in the record the alleged error occurred and where it was objected to and, where applicable the following:

(A) When the point involves the admission or rejection of evi-

dence, there shall be included a quotation of the ground urged at the trial for the objection and full substance of the evidence admitted or rejected.

(B) When the point involves the charge of the court, there shall be set out the specific words of the part referred to, whether it be instructions given or refused, together with the objections urged at the trial.

(C) When the point involves findings or conclusions of the court below, those urged as error shall be quoted in their entirely and there shall be included a statement explaining why the findings of fact or conclusions of law are alleged to be erroneous.

(D) When the point involves a ruling upon the report of a master, there shall be included a statement of the objection to the report and a summary of the action taken below.

Points not presented in accordance with this section will be disregarded, except that the court, at its option, may notice a plain error not presented.

(5) A brief separate section entitled "Standard of Review," setting forth the applicable standard or standards of review to be applied in reviewing the respective orders or decisions of the trial court or agency alleged to be erroneous.

(6) A short and concise statement of the question or questions presented for decision by the points specified under (b)(4) of this rule, set forth in the most general terms possible. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Questions not presented in accordance with this paragraph will be disregarded, except that the court, at its option, may notice a plain error not presented.

(7) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon. The argument may be preceded by a concise summary.

(8) Relevant parts of the constitutional provisions, statutes, ordinances, treatises, regulations, or rules involved, setting them out verbatim. If lengthy they may be cited and their pertinent text set out in the appendix.

(9) Parts of the record material to the questions presented may be included in the appendix. Anything that is not part of the record shall be appended to the brief.

(10) A conclusion, specifying with particularity the relief sought.

(11) Statement of Related Cases. A brief statement identifying any related case known to be pending in the Hawaii courts or agencies. The statement shall include the following: case caption, docket number and the nature of the relationship. Cases are deemed related if they:

(A) arise out of the same or consolidated cases in the trial court or agency;

(B) involve a case that was previously heard in this court;

(C) involve the same parties;

(D) involve the same or closely related issues;

(E) involve the same basic transaction or event; or

(F) have any other similarities of which you think the court should be aware.

The statement shall be presented on a separate page entitled "Statement of Related Cases." The statement shall be the last page in the brief. If no other cases are deemed related, a single statement to this effect shall be provided. If a party identifies a case as related, no other party need duplicate the listing in that party's brief. If a party learns of a related case after filing the initial brief, that party shall promptly file a statement.

(c) **Answering Brief.** Within 40 days after service of appellant's opening brief, the appellee shall file an answering brief. The brief shall be of like character as that required of the appellant except that no statement of points shall be required, and no other section is required unless the section presented by the appellant is controverted. The answering brief shall contain a counterstatement of each section except points, unless the appellee is satisfied with the section included in the appellant's brief.

(d) **Reply Brief.** Within 10 days after service of appellee's answering brief, appellant may file a reply brief. The reply brief shall be confined to matter presented in the answering brief. If no reply brief is to be filed, appellant shall notify the clerk and appellee in writing of that decision prior to expiration of the time for filing the reply brief.

(e) **Briefs on Reserved Questions.** In cases in which a single question has been reserved, the party maintaining the affirmative shall, for the purpose of this rule, be regarded as the appellant and the party opposing the question the appellee. So also where there are several questions and one party has the affirmative as to all of them. Where several questions have been reserved as to which a party maintains the affirmative as to some and the negative as to others, the

plaintiff shall be regarded as the appellant and the defendant as the appellee, unless, upon application to the court, an order specifying otherwise is issued by the court.

(f) **Briefs in Original Cases.** This rule shall apply to cases brought originally in the Hawaii Supreme Court, unless otherwise ordered by the court. For the purpose of this rule, when a case is brought originally in this court, the party who would be regarded as the plaintiff or petitioner if the matter were instituted in a lower court shall be regarded as the appellant, and the opposing party the appellee.

(g) **Brief of Amicus Curiae.** A brief of an amicus may be filed only by order of the court which shall fix the time for filing the same and any response thereto. The court may allow or disallow the filing of such brief with or without a hearing. All briefs of an amicus curiae shall comply with the applicable provisions of Rule 28. The Attorney General may file a brief amicus curiae without order of the court in all cases where the constitutionality of any statute of the State of Hawaii is drawn in question.

(Amended February 20, 1985, effective February 20, 1985.)

APPENDIX G

Excerpts from attachments to Children's Hospital et al.'s Motion for Summary Judgment

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Attorneys for Defendants
Kauikeolani Children's Hospital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
	)
Plaintiffs,	) MOTION FOR SUMMARY
	) JUDGMENT;
vs.	) MEMORANDUM IN
	) SUPPORT OF MOTION FOR
KAPIOLANI CHILDREN'S	) SUMMARY JUDGMENT;
MEDICAL CENTER, et al.,	) AFFIDAVIT OF RICHARD
	) DAVI; AFFIDAVIT OF PAUL
Defendants.	) E. COOK; AFFIDAVIT OF
	) WALTON K.T. SHIM, M.D.;
	) AFFIDAVIT OF STANLEY
	M.K. CHUNG, M.D.;
	AFFIDAVIT OF FRANCES A.
	HALLONQUIST; EXHIBITS
	A-W; NOTICE OF MOTION
	FOR SUMMARY
	JUDGMENT AND
	CERTIFICATE OF SERVICE

DATE: January 29, 1985
TIME: 9:00 a.m.
JUDGE: EDWIN HONDA

MOTION FOR SUMMARY JUDGMENT

Come now, Defendants Kauikeolani Children's Hospital

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CHRONOLOGY OF EVENTS

Exhibit A — *April 5, 1977:* Dr. Tun submits his application for privileges (*see* Exhibit A attached hereto). On July 7, 1977, additional documents were submitted to complete the application.

Exhibit B — *October 6, 1977:* Dr. Tun is notified that the Board of Trustees, upon recommendation of the Medical Executive Committee, has granted Probationary Privileges in the practice of Anesthesiology, Department of Special Clinics, Active Staff. Also, Tun is advised that he can apply for termination of his probationary status by submitting to the Chief of Surgery a complete summary of the hospital records of five (5) patients, private or staff, cared for in the hospital by Dr. Tun during his period of probation, including operating room evaluation of five cases by at least three different observers. (*See* Exhibit B attached hereto.)

Exhibit C — *October 16, 1977:* Tun's probationary privileges were granted pursuant to Article V of the By-Laws, Rules and Regulations of the Medical and Dental Staff, a copy of which is attached hereto as Exhibit C.

Exhibit D — *June 15, 1982:* Dr. Tun submits second application for appointment to Medical Staff (for privileges) (*see* Exhibit D). This would be done pursuant to Article V of the By-Laws. (*See* Exhibit C.)

Exhibit E — *June 23, 1982:* Dr. Tun is informed that temporary privileges have been granted effective immediately through approximately early September, but that "newborn anesthesia and cardiovascular anesthesia privileges are not approved at this time, pending receipt of documentation of training/experience in those areas." (*See* Exhibit E.) Dr. Tun was provided with Surgical Observer information sheets. The various departments

Exhibit F — of the hospital were also advised that Dr. Tun had been granted these privileges (*see* Exhibit F).

The temporary privileges were granted pursuant to Article VI of the By-Laws, a copy of which is attached as Exhibit C.

Exhibit G — *July 2, 1982:* The Surgical Executive Committee met and approved the granting of temporary privileges

to Dr. Tun. *See* Exhibit G attached hereto.

The medical Executive Committee again acted pursuant to Article V of the By-Laws (*see* Exhibit C).

Exhibit H — *July 3 and 7, 1982:* Dr. Tun was "observed" in the operating room administering anesthesia on two occasions on July 3 and two occasions on July 7, 1982. A summary of these observations is attached as Exhibit H, which is in the file of Children's Hospital. The two observations on July 7, 1982 by Dr. Hattori led to the termination of Dr. Tun's "temporary privilages".

Exhibit I — *July 9, 1982:* Dr. Tun is advised by Children's Hospital that his temporary privileges in Anesthesiology were terminated pursuant to a recommendation by the Chief of Surgery (*see* Exhibit I). Dr. Tun was advised of his right to appeal pursuant to Article VII, Section 2, a copy of which is attached hereto as Exhibit C.

This action was authorized by Article VII, Section 2, which provides that the Chief-of-Staff or the chief of a department or the Chief Executive Officer, etc. can summarily suspend all or any portion of clinical privileges of a doctor. Article VII, Section 2 also provides that the doctor can request that the Medical Executive Committee hold a hearing in accordance with Article VIII.

Also, on July 9, 1982, Dr. Stanley M.K. Chung, Chief of Surgery, wrote to Mr. Davi, as president of Children's Hospital, recommending that Dr. Tun's privileges be terminated based on Dr. Hattori's "observations" of Dr. Tun's performance in administering anesthesia to two patients on July 7. A copy of Dr. Chung's letter is attached as Exhibit J.

Exhibit J

Exhibit K — *July 13, 1982:* The Credentials Committee met on Dr. Tun's application for provisional privileges and agreed to recommend (to the Medical Executive Committee) that privileges not be granted. (*See* Exhibit K.)

This Credentials Committee meeting was pursuant to Article V, Section 2 of the by-Laws (*see* Exhibit C).

Exhibit L — *July 27, 1982:* The Medical Executive Committee met and agreed to reject Dr. Tun's application for professional privileges in anesthesia (*see* Exhibit C).

Exhibit M — *July 28, 1982:* Dr. Tun is notified of the Medical Executive Committee's decision to recommend to the Board of Trustees that his application to be rejected. Dr. Tun is also advised of his right to request a hearing before an Ad Hoc committee of the Medical Staff within 15 days pursuant to Article V, Section 2 and Article VIII of the By-Laws. (*See* Exhibit M.)

This notice was sent pursuant to Article V, Section 2 of the By-Laws.

Exhibit N — *August 13, 1982:* Dr. Tun writes to "Children's Hospital" acknowledging the July 28, 1982 letter and states that he has sufficient work in other hospitals "that I don't find it necessary to avail myself of your facilities at this point of time." (*See* Exhibit N.)

Exhibit O — *September 30, 1982:* Dr. Tun is advised by Children's Hospital that the Board of Trustees, upon recommendation of the Medical Executive Committee, rejected his application and that this action was taken following receipt of Dr. Tun's August 13, 1982 letter in which he waived his right to a hearing. (*See* Exhibit O.)

The Board of Trustees' action was pursuant to Article V, Section C.2.c, and Section V.D. of the By-Laws (*see* Exhibit C attached hereto).

Exhibit P — *October 14, 1982:* Dr. Tun's attorney, Mr. Canlas, writes to Children's Hospital, claiming Dr. Tun never waived his right to a hearing in his August 13, 1982 letter, and that since there was no waiver of a right to a hearing, and since Dr. Tun had not pursued his application with the hospital, there has never been a rejection of his application by the Medical Executive Committee (*see* Exhibit P).

Exhibit T — *October 20, 1982:* Dr. Hattori, as Chief of Anesthesiology of Children's Hospital, sent a form questionnaire provided by Queen's in which he stated that he did not believe that Dr. Tun "is ready to give anesthesia for Children's unless he seeks further training in the field of pediatric anesthesiology" (*see* Exhibit T. attached hereto). This communication is privileged pursuant to H.R.S. §663-1.7(c).

Exhibit Q — *December 20, 1982:* Children's Hospital advises Dr. Tun that he is entitled to an appellate review by the Board of Directors in accordance with Article V, Section 2, D-1, b-2 of the By-Laws; that the Board will withdraw its prior decision to permit appellate review and a new decision by the Board; that Dr. Tun would have fifteen days following receipt of "this notice" to submit a written request for such an appellate review; and that failure to request the review would constitute a waiver. (*See* Exhibit Q.)

Exhibit R — *January 3, 1983:* Mr. Canlas (attorney for Dr. Tun) writes to Children's Hospital acknowledging the December 20 letter and says he wants until January ~~14~~ to review the matter. (Exhibit R.)

Exhibit S — *March 10, 1983:* Children's Hospital again advises Dr. Tun that the Board of Trustees has upheld the Medical Executive Committee's prior recommendation (to not grant privileges) and that this action was taken following non-receipt of a written request for appellate review. (*See* Exhibit S.)

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
	)
Plaintiffs	) AFFIDAVIT OF
	) RICHARD DAVI
vs.	)
	)
KAPIOLANI CHILDREN'S MEDICAL CENTER, et al.,	)
	)
Defendants.	)
	)
	)

AFFIDAVIT OF RICHARD DAVI

STATE OF HAWAII)
:SS.
CITY AND COUNTY OF HONOLULU)

RICHARD DAVI, being first duly sworn on oath deposes and states:

1. In 1982 and 1983, Affiant was the President of Kauikeolani Children's Hospital (hereafter "Children's Hospital").

2. On June 15, 1982, Dr. Than Tun submitted his application for privileges at Children's, and on June 28, 1982, he was granted temporary privileges, which temporary privileges were confirmed by a meeting of the Surgical Executive Committee on July 2, 1982. The temporary privileges had restrictions in that Dr. Tun could not administer anesthesia to newborn and cardiovascular patients until he submitted documentation of training and experience in these areas. Dr. Tun was to be observed while administering anesthesia in at least two additional cases before he would be considered for permanent privileges.

3. Dr. Tun was observed by Dr. Mitsuo Hattori during two anesthesia procedures performed by Dr. Tun on July 7, 1982. Dr. Hattori was Chief of Anesthesia at Children's Hospital. As a result of these observations, Affiant received a July 9, 1982 letter from Dr. Stanley M.K. Chung, recommending that Dr. Tun's temporary privileges be terminated. (*See* Exhibit J attached to Motion for Summary Judgment filed herewith by Children's Hospital.) On July 9, 1982, Mr. Paul Cook wrote to Dr. Tun, advising him that his

temporary privileges had been revoked. Mr. Cook's actions were authorized by Article VII, Section 2 of the By-Laws. Dr. Tun was advised of his right to appeal this action. This action taken by Mr. Cook with Affiant's consent was based on the recommendation of Dr. Stanley M.K. Chung, Chief of Surgery, and Dr. Chung's recommendation was based on the recommendation of Dr. Mitsuo Hattori, Chief of Anesthesiology, after Dr. Hattori observed Dr. Tun in two cases on July 7, 1982.

4. On July 13, 1982 the Credentials Committee, which is comprised of independent physicians with staff privileges at Children's Hospital, met and decided to recommend against the granting of privileges to Dr. Tun. On July 27, 1982 the Medical Executive Committee, which is also comprised of physicians with privileges at Children's Hospital, met and agreed to reject Dr. Tun's application for privileges. Neither Affiant nor Mr. Paul Cook is a member of the Credentials Committee or the Medical Executive Committee. These committees are comprised of physicians with privileges at Children's Hospital who have the expertise to pass on the qualifications of any physician applying for privileges.

5. On July 28, 1982, Mr. Paul E. Cook advised Dr. Tun of the decision of the Medical Executive Committee and of Dr. Tun's rights of appeal. On August 13, 1982, Dr. Tun wrote a letter to Children's Hospital stating, "I have sufficient work in other hospitals, that I don't find it necessary to avail myself of your facilities, at this point of time." On September 30, 1982, Dr. Tun was advised in writing by Affiant that the Board of Trustees, upon recommendation of the Medical Executive Committee, had rejected his application; and after correspondence with Dr. Tun's attorney, Dr. Tun was advised in writing on December 20, 1982, that he would be given another chance for appellate review by the Board of Trustees if he so desired. On January 3, 1983, a letter was received from Dr. Tun's attorney, requesting additional time to consider this offer, but neither Dr. Tun nor his attorney ever requested a review of Children's Hospital's denial of Dr. Tun's application for privileges.

6. Affiant at all times in this matter acted pursuant to the By-Laws of Children's Hospital and afforded Dr. Tun all of the rights of review and appeal that are afforded by the By-Laws, and in fact on December 20, 1982, afforded Dr. Tun a right of review by the Board of Trustees that was in addition to the rights of review and appeal provided in the By-Laws. Dr. Tun never availed himself of any right

of review of appeal provided in the By-Laws. Affiant, in all of his dealings with Dr. Tun, acted without malice or prejudice towards Dr. Tun; and Affiant attempted to, and did, advise Dr. Tun of all rights of appeal and review that he was entitled to under the By-Laws. Affiant is not a medical doctor and must rely upon the medical expertise of doctors who have staff privileges at Children's Hospital as to the competency of physicians applying for privileges at Children's Hospital. In the case of Dr. Tun, Dr. Mitsuo Hattori, Chief of Anesthesia, recommended to Dr. Stanley M.K. Chung, Chief of Surgery, that Dr. Tun's temporary privileges be revoked after Dr. Hattori observed Dr. Tun during two procedures on July 7, 1982. Dr. Tun had the right to have this decision reviewed and did not do so; and he also had the right to have the decision of the Medical Executive Committee and the Board of Trustees reviewed, and again chose not to do so. Dr. Tun was then on December 20, 1982, given another chance for appellate review by the Board of Trustees which is not provided in the By-Laws, and again he did not request this review.

Further Affiant sayeth naught.

DATED: Honolulu, Hawaii, December 24, 1984.

/S/ Richard Davi

[Jurat]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
	)
Plaintiffs,	) AFFIDAVIT OF
	) PAUL E. COOK
vs.	)
	)
KAPIOLANI CHILDREN'S	)
MEDICAL CENTER, et al.,	)
	)
Defendants.	)
	)
	)

AFFIDAVIT OF PAUL E. COOK

STATE OF HAWAII)
:SS.
CITY AND COUNTY OF HONOLULU)

PAUL E. COOK, being first duly sworn on oath deposes and states:

1. In 1982 and 1983, Affiant was the Executive Vice President of Kauikeolani Children's Hospital (hereafter "Children's Hospital").

2. Affiant has read the Affidavit of Richard Davi and the Chronology of Events attached to the Motion for Summary Judgment filed herewith by Children's Hospital and agrees with the facts set forth in said documents.

3. As the Executive Vice President, Affiant attempted to comply with the By-Laws of the Children's Hospital in every respect with regard to Dr. Tun's application for privileges, and the cancellation of Dr. Tun's temporary privileges and denial of his application for privileges.

4. Affiant believes that Dr. Tun was afforded all rights of review and appeal provided for in the By-Laws of Children's Hospital, and Dr. Tun did not avail himself of any of these rights of review or appeal.

5. Affiant at all times acted without malice or prejudice with regard to Dr. Tun and his application for privileges, the suspension of his temporary privileges and denial of his application for privileges;

and Affiant attempted to treat Dr. Tun fairly, affording him every right of review and appeal provided for in the By-Laws.

Further Affiant sayeth naught.

DATED: Honolulu, Hawaii, December 26, 1984.

/S/Paul E. Cook

[Jurat]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
Plaintiffs,	) AFFIDAVIT OF
	) STANLEY M.K. CHUNG,
vs.	) M.D.
KAPIOLANI CHILDREN'S MEDICAL CENTER, et al.,	)
Defendants.	)

AFFIDAVIT OF STANLEY M.K. CHUNG, M.D.

STATE OF HAWAII)
:SS.
CITY AND COUNTY OF HONOLULU)

STANLEY M.K. CHUNG, M.D., being first duly sworn on oath deposes and states:

1. At all times mentioned herein Affiant was an independent physician with staff privileges at Kauikeolani Children's Hospital (hereafter "Children's Hospital"), and acted as the Chief of Surgery at Children's Hospital.

2. On or about July 8, 1982, Affiant received an oral report from Dr. Mitsuo Hattori, Chief of Anesthesiology at Children's Hospital, regarding Dr. Than Tun. Dr. Hattori described two procedures that he had observed on July 7, 1982, in which Dr. Tun administered anesthesia to patients at Children's Hospital. As a result of events which took place during those procedures which involved endangering the well-being of the patients, Dr. Hattori was of the opinion that Dr. Tun's temporary privileges should be revoked. Affiant then on July 9, 1982, wrote to Mr. Richard Davi, recommending that Dr. Tun's temporary privileges be revoked and that no further privileges be granted. (*See* Exhibit J attached to Motion for Summary Judgment filed herewith by Children's Hospital.)

3. On July 27, 1982, Affiant was a member of the Medical Executive Committee. This committee decided to reject Dr. Tun's application for privileges based on the recommendation of Dr. Hattori to Affiant.

4. All of Affiant's actions in this case were done without malice or prejudice towards Dr. Tun, and were done solely in the best interests and for the safety of patients at the Children's Hospital, and were done pursuant to the By-Laws of the Children's Hospital.

Further Affiant sayeth naught.

DATED: Honolulu, Hawaii, December 20, 1984.

/S/Stanley M.K. Chung, M.D.

[Jurat]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
	)
Plaintiffs,	) AFFIDAVIT OF
	) WALTON SHIM, M.D.
vs.	)
	)
KAPIOLANI CHILDREN'S MEDICAL CENTER, et al.,	)
	)
Defendants.	)
	)
	)

AFFIDAVIT OF WALTON SHIM, M.D.

STATE OF HAWAII)
:SS.
CITY AND COUNTY OF HONOLULU)

WALTON SHIM, M.D., being first duly sworn on oath deposes and states:

1. At all times mentioned herein, he was an independent physician with privileges at Kapiolani Children's Hospital (hereafter "Children's Hospital") and acted as the Chief of Staff at Children's Hospital.

2. On July 13, 1982, Affiant was a member of the Credentials committee of Children's Hospital, which committee met and agreed to recommend to the Medical Executive Committee that the application of Dr. Tun for privileges be denied. On July 27, 1982, Affiant was the Chairman of the Medical Executive Committee, which committee decided to reject Dr. Tun's application for privileges in anesthesiology. Both the actions of the Credentials Committee and the Medical Executive Committee were based on Dr. Tun's performance on July 7, 1982, in administering anesthesia to two patients at Children's Hospital, which procedures were observed and reported by Dr. Mitsuo Hattori, who felt Dr. Tun should not have privileges at Children's Hospital.

3. All of Affiant's actions were pursuant to the By-Laws of the Children's Hospital. Affiant acted without malice or prejudice towards Dr. Tun, and acted only in the best interests of the safety and

welfare of patients at Children's Hospital.

Further Affiant sayeth naught.

DATED: Honolulu, Hawaii, January 7, 1985.

/S/Walton Shim, M.D.

[Jurat]

Excerpt from Exhibit A to Children's Hospital, et al.'s Motion for Summary Judgment

AUTHORIZATION FOR RELEASE OF INFORMATION

I agree to abide by the Medical Staff By-Laws, Rules and Regulations of Kauikeolani Children's Hospital as now existing or hereafter amended and authorize the Hospital to investigate and review my qualifications for the purpose of appointment to the staff or renewal of privileges.

I further authorize any individual and/or organization to release any information requested by Kauikeolani Children's Hospital, including records and documents, which may bear on my qualifications. In so doing, I hereby release Kauikeolani Children's Hospital and any individual or organization from liability arising out of or relating to the disclosure of such information or to any action taken by them or their agents in good faith and without malice, in connection with my appointment to the staff or renewal of my staff privileges. Photocopies of this document will be as binding as the original.

/S/Than Tun, M.D.

Signature of Physician

Dated April 5, 1977

Exhibit B to Children's Hospital, et al.'s Motion for Summary Judgment

Kauikeolani Children's Hospital

October 16, 1977

Than Tun, M.D.
1374 Nuuanu Avenue, #200-A
Honolulu, Hawaii 96817

Dear Dr. Tun:

It is a pleasure to advise you that the Board of Trustees, upon recommendation of the Medical Executive Committee, has approved your application for privileges at Children's Hospital.

You have been granted Probationary Privileges in the practice of Anesthesiology, Department of Special Clinics, Active Staff.

Enclosed is a copy of our present Medical Staff By-Laws, Rules and Regulations. Please peruse the By-Laws and, at your earliest convenience, drop by the Administrator's Office to sign our Minute Book signifying your acceptance of these By-Laws. Your attention is particularly directed to Article VI, which deals with determination of qualifications and privileges for both medical and surgical services.

A Probationer may apply for termination of his probationary status by submitting to the Chief of Surgery a complete summary of the hospital records of five (5) patients, private or staff, cared for in the hospital by the applicant during his period of probation, including operating room evaluation of five (5) cases by at least three (3) different observers. If unable to accumulate five (5) cases the probationer may submit two (2) observed and approved cases performed at this hospital during two (2) years of probation while actively practicing in the City and County of Honolulu. These cases should be representatives of the complexity and type of major surgery upon which privileges are desired.

If you have any suggestions or criticisms that you care to make at any time that will further the improvement of services to our hospital, please note your comments in writing and forward them to the Medical Executive Committee.

We welcome you to the Medical Staff at Children's Hospital, and we look forward to your participation as a member of the active staff.

Sincerely,
Paul E. Cook
Administrator

Exhibit C to Children's Hospital, et al.'s Motion for Summary Judgment

Excerpt from Children's Hospital Medical Staff By-Laws

ARTICLE V. PROCEDURES FOR MEDICAL STAFF MEMBERSHIP AND MEMBERSHIP RENEWAL

SECTION 1. APPLICATION FOR MEMBERSHIP

A. Application for membership to the Medical Staff shall be presented in writing on a prescribed form which shall:

1. Indicate the staff category and privileges for which the applicant qualifies.
2. State the qualifications and references of the applicant. Two letters of recommendation must be provided. One letter should be from the Director of Residency where the applicant received his/her residency, and the other should be from the last institution with which affiliated. Documented evidence of specialized training must be provided.
3. Include information as to whether the applicant's membership status and/or clinical privileges have ever been revoked, suspended, reduced or not renewed at any other hospital or institution, and as to whether his membership in local, state or national medical societies, or his license to practice in any jurisdiction has ever been suspended or terminated.
4. Permit the hospital to obtain information from previously-attended hospitals or other institutions regarding his professional performance.
5. Include a statement that the applicant has no physical or mental impairment affecting his professional performance.
6. Include a statement that the applicant has had cardiopulmonary resuscitation certification within the past two years.
7. Include a statement that the applicant has complied with all continuing medical education requirements for current licensing in the State of Hawaii.
8. Signify his agreement to abide by the Bylaws, Rules and Regulations currently in effect (a copy of the Bylaws should accompany the application form).

B. The properly completed application for membership shall be presented to the Chief Executive Officer for transmittal to the Credentials Committee.

C. It shall be the applicant's burden to resolve any reasonable questions which arise because of his application to the satisfaction of

the Credentials Committee.

SECTION 2. PROCEDURE FOR PROCESSING APPLICATION

A. Function of the Chief Executive Officer. Upon receipt of the application, the Chief Executive Officer shall:
   1. Inspect for proper completion.
   2. Notify the applicant promptly:
      a. Of receipt of the application.
      b. If the application is incomplete or faulty and return it for proper completion.
      c. Of meeting dates of the Credentials Committee and Medical Executive Committee, and that final action will be approval by the Board of Trustees.
   3. Refer the application to the Credentials Committee at its next regular meeting.

B. The Credentials Committee shall:
   1. Be responsible for the complete investigation and verification of the character, qualifications and standing of the applicant.
   2. If necessary, refer the application to the appropriate departmental committees for review of special qualifications.
   3. If necessary, request the applicant to present himself for a personal interview.
   4. Within thirty (30) days of receipt of the application, file a written report of its findings and recommendations with the Medical Executive Committee. The recommendations shall be to:
      a. Defer. When this recommendation is made, the committee shall:
         1) Indicate the reasons.
         2) Notify the applicant of the deferred action and the reasons thereof.
         3) Within thirty days following the initial report, file a supplementary report.
      b. Accept. When this recommendation is made, the committee shall also assign privileges as provided in Article VI of these Bylaws.
      c. Reject. When this recommendation is made, the reasons for rejection shall be clearly documented.

C. The Medical Executive Committee shall:
   1. Review the findings and recommendations of the Credentials Committee.

2. Within thirty (30) days of receipt of the report from the Credentials Committee, file a written report of its findings and recommendations with the Board of Trustees.
   a. If the Medical Executive Committee agrees with the recommendations of the Credentials Committee, and
      1) The recommendation is to defer: No further action is to be taken until a follow-up report is received from the Credentials Committee.
      2) The recommendation is to accept: Recommendation may be accepted as submitted or modified. If modified, the reasons for modification shall be clearly documented.
      3) The recommendation is to reject: The documentation must show that this action is unanimous.
   b. If the Medical Executive Committee disagrees with the recommendations of the Credentials Committee, it shall return the report to the Credentials Committee, stating its reasons. The Credentials Committee shall re-evaluate and submit a supplementary report as in Paragraph B above.
3. Inform the applicant via certified mail, return receipt requested, of his rights to a hearing as provided in Article VIII of these Bylaws if the recommendation is adverse with respect to membership or privileges.
   a. If the applicant waives his right to a hearing, this fact shall be noted in the report.
   b. If the applicant requests a hearing, such hearing shall be held as provided in Article VIII, and a full account of the proceedings shall become a part of this report.
   c. No such adverse recommendation need be forwarded to the Board of Trustees until after the practitioner has exercised or has been deemed to have waived his right to a hearing as provided in Article VIII of these Bylaws.
   d. If, after the Medical Executive Committee has considered the report and recommendation of the hearing committee and the hearing record, the Medical Executive Committee's reconsidered recommendation is favorable to the practitioner, it shall be processed in accordance with Subparagraph C-2 of this Section 2. If such recommendation continues to be adverse, the Chief Executive Officer shall promptly notify the practitioner by certified mail, return

receipt requested. The Chief Executive Officer shall also forward such recommendation and documentation to the Board of Trustees, but the Board of Trustees shall not take any action thereon until after the practitioner has waived his right to an appellate review as provided in Article VIII of these Bylaws.

D. The Board of Trustees shall, at its next regular meeting:

1. Review the report and recommendations of the Medical Executive Committee. Its action shall be to either agree or disagree with the recommendations.
   a. If the Board of Trustees agrees with the findings and recommendations, it shall act on the matter.
      1) If the Board ratifies the recommendation to accept the applicant as a member, the Chief Executive Officer shall be authorized to transmit the decision to the applicant. The acceptance shall be on a provisional basis subject to review at the end of twelve (12) months before full membership can be granted. Such notice shall include assigned privileges.
      2) If the Board ratifies the recommendation to reject, the Chief Executive Officer shall be instructed to transmit this decision and inform the applicant of his rights to appellate review as provided in Article VIII by certified mail, return receipt requested.
   b. If the Board of Trustees disagrees with the recommendations, it shall:
      1) Return the report to the Medical Executive Committee, stating its reasons.
      2) Direct additional hearings.
      3) Submit the matter to a Joint Conference Committee.
      4) Render final decision only after 1, 2, or 3 above has been accomplished.
      5) The fact that the adverse decision is held in abeyance shall not be deemed to confer privileges where none existed before.
      6) At its next regular meeting after all of the practitioner's rights under the Article VIII have been exhausted or waived, the Board of Trustees or its duly organized committee shall act in the matter. The Board of Trustees' decision shall be conclusive, except that the

Board of Trustees may defer final determination by referring the matter back for further reconsideration. Any such referral back shall state the reasons therefore, shall set a time-limit within which a subsequent recommendation to the Board of Trustees shall be made, and may include a directive that an additional hearing be conducted to clarify issues which are in doubt. At its next regular meeting after receipt of such subsequent recommendation and new evidence in the matter, if any, the Board of Trustees shall make a decision either to provisionally appoint the practitioner to the staff or to reject him for staff membership. All decisions to appoint shall include a delineation of the clinical privileges which the practitioner may exercise.

7) When the Board of Trustees' decision is final, it shall send notice of such decision through the Chief Executive Officer to the Chief of Staff and to the Chief of Department concerned, and by certified mail, return receipt requested, to the practitioner.

SECTION 3. MEMBERSHIP RENEWAL PROCESS

A. Forty-five (45) days prior to the expiration of his membership, a member shall be notified in the form of a "Renewal Notice."

1. The renewal notice shall include:

a. The category of membership for which he qualifies.

b. A certification statement, to be signed by the member, that:

1) He is free of any physical or mental impairment affecting his professional competence, noting any exceptions.

2) He has complied with all continuing education requirements for current licensing in the State of Hawaii.

c. Request for information regarding additional or specialized training that may affect his privileges.

d. Include information as to whether the applicant's membership status and/or clinical privileges have ever been revoked, suspended, reduced or not renewed at any other hospital or institution, and as to whether his membership in local, state or national medical societies, or his license to practice in any jurisdiction has ever been suspended or terminated.

e. Permit the hospital to obtain information from previously-attended hospitals or other institutions regarding his professional performance.

f. Request for recent or anticipated address/phone changes.

2. The renewal notice must be signed and returned to the Credentials Committee within fifteen (15) days. Failure to respond shall be construed as voluntary termination of medical staff membership.

3. It shall be the applicant's burden to resolve any reasonable questions pertaining to his membership renewal to the satisfaction of the Credentials Committee.

B. The Credentials Committee shall be responsible for the appraisal of all aspects of a member's professional competence including, but not necessarily limited to, a member's technical abilities, adherence to standards of moral and ethical conduct, compliance with the Bylaws, Rules and Regulations, awareness of physical and mental limitations, and willingness to participate in the affairs of the Medical Staff. The Credentials Committee is hereby authorized to:

1. Avail itself of all sources of information regarding a member's professional performance.

2. Develop its own reappraisal criteria subject to approval by the Medical Executive Committee.

C. Any adverse recommendations shall be subject to the provisions of Article VIII.

D. The Credentials Committee shall transmit its recommendations to the Medical Executive Committee and Board of Trustees for final approval.

ARTICLE VI. CLINICAL PRIVILEGES

SECTION 1. CLINICAL PRIVILEGES RESTRICTED

A. Every practitioner practicing at this hospital by virtue of Medical Staff membership or otherwise shall, in connection with such practice, be entitled to exercise only those clinical privileges specifically granted to him by the Board of Trustees, except as provided in Sections 2 and 3 of this Article VI.

B. Every initial application for staff appointment must contain a request for the specific clinical privileges desired by the applicant. The evaluation of such requests shall be based upon the applicant's education, training, experience, demonstrated competence, references and other relevant information, including an

appraisal by the service in which such privileges are sought. The applicant shall have the burden of establishing his qualifications and competency in the clinical privileges he requests.

C. Periodic redetermination of clinical privileges and the increase or curtailment of same shall be based upon the direct observation of care provided, review of the records of patients treated in this or other hospitals, and review of the records of the Medical Staff which document the evaluation of the member's participation in the delivery of medical care.

D. Members of the Active or Courtesy Staff who become inactive while in good standing may later reapply for privileges. An interim letter and other information deemed necessary may suffice, or completion of the application form may be required and shall be determined at the discretion of the Credentials Committee.

E. Privileges granted to dentists shall be based on their training, experience and demonstrated competence and judgment. The scope and extent of surgical procedures that each dentist may perform shall be specifically delineated and granted in the same manner as all other surgical privileges. Surgical procedures performed by a dentist shall be under the overall supervision of the Chief of Surgery. All dental patients shall receive the same basic medical appraisal as patients admitted to other surgical services.

F. Management of Hospitalized Dental Patients. A dentist must be responsible for seeing that his patient is admitted under the medical supervision of a physician with admitting privileges (Active or Courtesy). This physician must be someone other than the anesthesiologist for that case. Preoperative lab requirements and x-ray examinations are necessary when indicated to precede all dental surgery.

G. Anesthesia. An M.D. anesthesiologist must be responsible for the anesthesia of a dental patient.

SECTION 2. TEMPORARY PRIVILEGES

A. Upon receipt of an application for Medical Staff membership from an appropriately licensed practitioner, the Chief Executive Officer may, upon the basis of information then available which may reasonably be relied upon as to the competence and ethical standing of the applicant, and with the concurrence of the service chief concerned and of the Chief of Staff, grant temporary admitting and clinical privileges to the applicant; but in exercising such

privileges, the applicant shall act under the supervision of the Chief of Department to which he is assigned. The Chairman of the Credentials Committee will be notified of such appointment.

B. Temporary clinical privileges may be granted by the Chief Executive Officer for the care of a specific patient to a practitioner who is not an applicant for membership in the same manner and upon the same conditions as set forth in Section 2-A, provided that there shall first be obtained such practitioner's signed acknowledgment that he had received and read copies of these Medical Staff Bylaws, Rules and Regulations adopted pursuant thereto, and that he agrees to be bound by the terms thereof in all matters relating to his temporary clinical treatment of not more than six (6) patients in any one year by any practitioner, beyond which such practitioner shall be required to apply for membership on the Medical Staff before being allowed to attend additional patients.

C. The Chief Executive Officer may permit a physician serving as a locum tenens for a member of the Medical Staff to attend patients without applying for membership on the Medical Staff for a period not to exceed sixty (60) days, providing all of his credentials have first been approved by the Chief of Department concerned and by the Chief of Staff. The Chairman of the Credentials Committee shall be notified of such an appointment.

D. Special requirements of supervision and reporting may be imposed by the Chief of Department concerned on any practitioner granted temporary privileges. Temporary privileges shall be immediately terminated by the Chief Executive Officer upon notice of any failure by the practitioner to comply with such special conditions.

E. The Chief Executive Officer may at any time, upon the recommendation of the Chief of Staff or the Chief of Department concerned terminate a practitioner's temporary privileges effective as of the discharge from the hospital of the practitioner's patient(s) then under his care in the hospital. However, where it is determined that the life or health of such patient(s) would be endangered by continued treatment by the practitioner, the termination may be imposed by any person entitled to impose a summary suspension pursuant to Section 2-A, Article VII of these Bylaws, and the same shall be immediately effective. The appropriate Chief of Department, or the Chief of Staff in his

absence, shall assign a member of the Medical Staff to assume responsibility for the care of such terminated practitioner's patient(s) until they are discharged from the hospital. The wishes of the patient(s) shall be considered where feasible in selection of such substitute practitioner.

SECTION 3. EMERGENCY PRIVILEGES

In the case of emergency, any physician or dentist member of the Medical Staff, to the degree permitted by his license and regardless of service or staff status or lack of it, shall be permitted and assisted to do everything possible to save the life of a patient, using every facility of the hospital necessary, including the calling for any consultation necessary or desirable. When an emergency situation no longer exists, such physician or dentist must request the privileges necessary to continue to treat the patient. In the event such privileges are denied or he does not desire to request privileges, the patient shall be assigned to an appropriate member of the Medical Staff. For the purpose of this section, an "emergency" is defined as a condition in which serious permanent harm would result to a patient or in which the life of a patient is in immediate danger and any delay in administering treatment would add to that danger.

SECTION 4. SURGICAL PRIVILEGES

During the period of probation (Article IV, Section 5), all operative procedures performed by the probationer shall be carried out under the observation of a member of the active surgical staff with full privileges in the specialty involved, or observers on service as provided by the Chief of the Department of Surgery.

A. A probationer may apply for termination of his provisional status by submitting to the Chief of Surgery a complete summary of the hospital records of five (5) patients; private or staff, cared for in the hospital by the applicant during his period of probation, including operating room evaluation of five (5) cases by at least three (3) different observers. If unable to accumulate five (5) cases, the probationer may submit two (2) observed and approved cases performed at this hospital during two (2) years of probation while actively practicing in the City and County of Honolulu. These cases should be representative of the complexity and type of major surgery upon which privileges are desired.

B. The Chief of Surgery and the Surgical Executive Committee shall review the reports and call the candidate for further examination whenever deemed necessary. Upon completion of review of the

records of the candidate, the Chief of Surgery shall make recommendations to the Credentials Committee as follows:

1. The applicant be given unrestricted privileges in surgery, in which case the Chief of Surgery may rescind the necessity for further observation. This is a temporary measure effective until the Board of Trustees acts on the probationer's application for full privileges.
2. The applicant be given restricted privileges in surgery according to a plan established by the Surgical Executive Committee.
3. The provisional period be extended.
4. The provisional period be terminated until the candidate obtains further formal training.

SECTION 5. MEDICAL PRIVILEGES

A. A probationer may apply for termination of his provisional status by submitting to the Chief of Medicine a complete summary of the hospital records of five (5) inpatients, private or staff, cared for in the hospital by the applicant during his period of probation. Summaries may be either written individually by the probationer or be the chart summary dictated by the resident involved in the case.

B. The Chief of Medicine shall review the submitted summaries. Upon completion of review of the summaries, the Chief of Medicine shall make recommendations to the Credentials Committee as follows:

1. The applicant be given privileges commensurate with his abilities.
2. The applicant be given restricted privileges based on his qualifications.
3. The provisional period be extended.
4. The provisional period be terminated until the applicant obtains further formal training.

C. If deemed necessary, the Chief of Medicine may consult with the Chief of Family Practice, Chief of Surgery, Chiefs of the different clinical specialties and the Chairman of the Credentials Committee.

D. If, in the opinion of the Credentials Comittee and approved by the Medical Executive Committee, the applicant is in a non-surgical field where termination of provisional privileges by submission of the complete summaries of the hospital records of five (5)

inpatients personally attended is impractical (such as specialties having extremely rare admissions), the applicant may be considered for full status on the basis of hospital activities which shall include, but not be limited to, attendance at meetings and committee work.

SECTION 6. ALLIED HEALTH PROFESSIONALS

A. DEFINITIONS/QUALIFICATIONS. Allied Health Professionals (AHP's) are individuals who are not employees of the hospital who hold a license, certificate or other legal credentials as required by law and who:

1. Can present documents of acceptable backgrounds of formal education and experience in their particular field.
2. Are qualified to provide a needed service within the hospital.
3. Adhere strictly to the ethics of their respective professions.

B. PROCEDURE FOR SPECIFICATION OF SERVICES. Application for specified services shall be submitted and processed in the same manner as for clinical privileges for physicians and dentists as provided in Article V, and the AHP shall be assigned to the clinical department appropriate to his professional training and shall be subject to all regulatory policies of that department as approved by the Medical Executive Comittee. Privileges are renewable at the same interval as Medical Staff privileges.

C. RESPONSIBILITIES. Each AHP shall:

1. Provide patient care services only in the area of his/her professional competence and only under the supervision or direction of a physician member of the Medical Staff.
2. Participate as appropriate in patient care audit and other quality review, evaluation and monitoring activities required of the staff.
3. Sign an agreement to abide by all policies, rules and regulations of Kauikeolani Children's Hospital.
4. Document, within the medical record, services provided and shall make signed entries containing pertinent, meaningful observations and information to the extent of such services provided.

D. RELATIONSHIP TO SUPERVISING MEMBER OF THE MEDICAL STAFF. The member of the Medical Staff utilizing the services of an AHP shall:

1. Assume responsibility and liability for any actions taken and services performed by the AHP.

2. Document his/her approval of the services provided by countersigning within 24-hours all entries within the medical record signed by the AHP.

E. RELATIONSHIP TO BOARD OF TRUSTEES

1. Approval or disapproval of privileges is at the absolute discretion of the Board of Trustees.
2. The Board of Trustees reserves the right to terminate privileges at any time.

ARTICLE VII. CORRECTIVE ACTION

SECTION 1. PROCEDURE

A. Whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be lower than the standards or aims of the Medical Staff or to be disruptive to the operations of the hospital, corrective action against such practitioner may be requested by any officer of the Medical Staff, by the Chief of any Department, by the chairman of any standing committee of the Medical Staff, by the Chief Executive Officer or by the Board of Trustees. All requests for corrective action shall be in writing, shall be made to the Medical Executive Committee, and shall be supported by reference to the specific activities or conduct which constitute the grounds for the request.

B. Whenever the corrective action could be a reduction or suspension of clinical privileges, the Medical Executive Committee shall forward such request to the Chief of the Department wherein the practitioner has such privileges. Upon receipt of such request, the Chief of Department shall immediately appoint an Ad Hoc Committee to investigate the matter.

C. Within fifteen (15) days after the department's receipt of the request for corrective action, the Chief of Department shall make a report of its investigation to the Medical Executive Committee. Prior to the making of such report, the practitioner against whom corrective action has been requested shall have an opportunity for an interview with the department Ad Hoc investigating committee. At such interview, he shall be informed of the general nature of the charges against him and shall be invited to discuss, explain or refute them. This interview shall not constitute a hearing, shall be preliminary in nature, and none of the procedural rules provided in these Bylaws with respect to hearings shall apply thereto. A record of such interview shall be made by the department and included with its report to the Medical Executive Committee.

D. Within fifteen (15) days following the receipt of a request for corrective action, or following receipt of a report from a department following the department's investigation of a request for corrective action involving reduction or suspension of clinical privileges, the Medical Executive Committee shall take action upon the request. If the corrective action could involve a reduction or suspension of clinical privileges, or a suspension or expulsion from the Medical Staff, the affected practitioner shall be permitted to make an appearance before the Medical Executive Committee prior to its taking action on such request. This appearance shall not constitute a hearing, shall be preliminary in nature, and none of the procedural rules provided in these Bylaws with respect to hearings shall apply thereto. A record of such appearance shall be made by the Medical Executive Committee.

E. The action of the Medical Executive Committee on a request for corrective action may be to reject or modify the request for corrective action, to issue a warning, a letter of admonition or a letter of reprimand, to impose terms of probation or a requirement for consultation, to recommend reduction, suspension or revocation of clinical privileges, to recommend that an already imposed summary suspension of clinical privileges be terminated, modified or sustained, or to recommend that the practitioner's staff membership be suspended or revoked.

F. Any recommendation by the Medical Executive Committee for reduction, suspension or revocation on clinical privileges, or for suspension or expulsion from the Medical Staff, shall entitle the affected practitioner to the procedural rights provided in Article VIII of these Bylaws.

G. The Chief of Staff shall promptly notify the Chief Executive Officer in writing of all requests for corrective action received by the Medical Executive Committee and shall continue to keep the Chief Executive Officer fully informed of all action taken in connection therewith. After the Medical Executive Committee has made its recommendation on the matter, the procedure to be followed shall be as provided in Article V, Section 2, and in Article VIII if applicable, of these Bylaws.

SECTION 2. SUMMARY SUSPENSION

A. Any one of the following—the Chief of Staff, a Chief of Department, the Chief Executive Officer and the Executive Committee of either the Medical Staff or the Board of Trustees—shall each

have the authority, whenever action must be taken immediately in the best interest of patient care in the hospital, to summarily suspend all or any portion of the clinical privileges of a practitioner, and such summary suspension shall become effective immediately upon imposition.

B. A practitioner whose clinical privileges have been summarily suspended shall be entitled to request that the Medical Executive Committee hold a hearing on the matter within such reasonable time period thereafter as a Medical Executive Committee may be convened in accordance with Article VIII of these Bylaws.

C. The Medical Executive Committee may recommend modification, continuance or termination of the terms of the summary suspension. If, as a result of such hearing, the Medical Executive Committee does not recommend immediate termination of the summary suspension, the affected practitioner shall, also in accordance with Article VIII, be entitled to request an appellate review by the Board of Trustees, but the terms of the summary suspension as sustained or as modified by the Medical Executive Committee shall remain in effect pending a final decision thereon by the Board of Trustees.

D. Immediately upon the imposition of a summary suspension, the Chief of Staff or responsible Chief of Department shall have authority to provide for alternative medical coverage for the patients of the suspended practitioner still in the hospital at the time of such suspension. The wishes of the patients shall be considered in the selection of such alternative practitioner.

SECTION 3. AUTOMATIC SUSPENSION

A. A temporary suspension in the form of withdrawal of a practitioner's admitting privileges, effective until medical records are completed, shall be imposed automatically after warning of delinquency for failure to complete medical records pursuant to Rules and Regulations, Admission and Discharge section.

B. Action by the State Board of Medical Examiners revoking or suspending a practitioner's license shall automatically suspend all of his hospital privileges.

C. Failure to complete a History and Physical within 24-hours of admission will result in Automatic Suspension of Admitting Privileges.

D. It shall be the duty of the Chief of Staff to cooperate with the Chief Executive Officer in enforcing all Automatic Suspensions.

E. Automatic Suspension of privileges will be lifted upon correction of the deficiency.

F. For the notification process for suspension, see Rules and Regulations, Admission and Discharge section.

ARTICLE VIII. HEARING AND APPELLATE REVIEW OF PROCEDURE

SECTION 1. RIGHT TO HEARING AND TO APPELLATE REVIEW

A. When any practitioner receives written notice of a recommendation of the Medical Executive Committee that, if ratified by decision of the Board of Trustees, will adversely affect his appointment to or status as a member of the Medical Staff or his exercises of clinical privileges, he shall be entitled to a hearing following adequate notice thereof before an Ad Hoc Committee of the Medical Staff. If the recommendation of the Medical Executive Committee following such hearing is still adverse to the affected practitioner, he shall then be entitled to an appellate review by the Board of Trustees before the Board of Trustees makes a final decision on the matter.

B. When any practitioner receives notice of a decision by the Board of Trustees that will affect his appointment to or status as a member of the Medical Staff or his exercise of clinical privileges, and such decision is not based on a prior adverse recommendation by the Executive Committee of the Medical Staff with respect to which he was entitled to a hearing and appellate review, he shall be entitled to a hearing by a committee appointed by the Board of Trustees, and if such hearing does not result in a favorable recommendation, to an appellate review by the Board of Trustees before the Board of Trustees makes a final decision on the matter.

C. All hearings and appellate reviews shall be in accordance with the procedural safeguards set forth in this Article VIII to assure that the affected practitioner is accorded all rights to which he is entitled.

The Board of Trustees shall:

1. Advise the applicant of his right to a hearing or an appellate review pursuant to Article VIII of the Bylaws;
2. Specify that he shall have fifteen (15) days following the date of receipt of such notice within which to request a hearing or an appellate review.
3. Advise the applicant that failure to request a hearing or an

appellate review within the specified time period shall constitute a waiver of his right to same;

4. Upon receipt of the applicant's request, notify him of the date, time and place for the hearing or appellate review and the grounds upon which the adverse action is based; and
5. Advise him of his right to review the hearing record and report, if any, and to submit a written statement in his behalf as part of the appellate procedure.

SECTION 2. REQUEST FOR HEARING

A. The Chief Executive Officer shall be responsible for giving prompt written notice of an adverse recommendation or decision to any affected practitioner who is entitled to a hearing or to an appellate review, by a certified mail, return receipt requested.

B. The failure of a practitioner to request a hearing to which he is entitled by these Bylaws within the time and in the manner herein provided shall be deemed a waiver of his right to such hearing and to any appellate review to which he might otherwise have been entitled on the matter. The failure of a practitioner to request an appellate review to which he is entitled by these Bylaws within the time and in the manner herein provided shall be deemed a waiver of his right to such appellate review on the matter.

C. When the waived hearing or appellate review relates to an adverse recommendation of the Executive Committee on the Medical Staff or of a hearing committee appointed by the Board of Trustees, the same shall thereupon become and remain effective against the practitioner pending the Board of Trustees' decision on the matter. When the waived hearing or appellate review relates to an adverse decision by the Board of Trustees, the same shall thereupon become and remain effective against the practitioner in the same manner as a final decision of the Board of Trustees provided for in Section 7 of this Article VIII. In either of such events, the Chief Executive Officer shall promptly notify the affected practitioner of his status by certified mail, return receipt requested.

SECTION 3. NOTICE OF HEARING

A. Within fifteen (15) days after receipt of a request for hearing from a practitioner entitled to the same, the Executive Committee or the Board of Trustees, whichever is appropriate, shall schedule and arrange for such a hearing and shall, through the Chief Executive Officer, notify the practitioner of the time, place and

date so scheduled, by certified mail, return receipt requested. The hearing date shall be not less than seven (7) days nor more than fifteen (15) days from the date of receipt of the request for hearing; provided, however, that a hearing for a practitioner who is under suspension which is then in effect shall be held as soon as arrangements therefore may reasonably be made, but not later than fifteen (15) days from the date of receipt of such practitioner's request for hearing.

B. The notice of hearing shall state in concise language the acts or omissions with which the practitioner is charged, a list of specific or representative charts being questioned, and/or the other reasons or subject matter that was considered in making the adverse recommendation or decision.

SECTION 4. COMPOSITION OF HEARING COMMITTEE

A. When a hearing relates to an adverse recommendation of the Medical Executive Committee, such hearing shall be conducted by an Ad Hoc hearing committee of not less than 5 members of the Medical Staff appointed by the Chief of Staff in consultation with the Medical Executive Committee and one of the members so appointed shall be designated as Chairman. No staff member who has actively participated in the consideration of the adverse recommendation shall be appointed a member of this hearing committee.

B. When a hearing relates to an adverse decision of the Board of Trustees that is contrary to the recommendation of the Medical Executive Committee, the Board of Trustees shall appoint a hearing committee to conduct such a hearing and shall designate one of the members of this committee as Chairman. At least one representative from the Medical Staff shall be included on this committee when feasible.

SECTION 5. CONDUCT OF HEARING

A. There shall be at least a majority of the members of the hearing committee present when the hearing takes place, and no member may vote by proxy.

B. An accurate record of the hearing must be kept. The mechanism shall be established by the Ad Hoc hearing committee and may be accomplished by use of a court reporter, electronic recording unit, detailed transcription or by the taking of adequate minutes.

C. The personal presence of the practitioner for whom the hearing has been scheduled shall be required. A practitioner who fails

without good cause to appear and proceed at such hearing shall be deemed to have waived his rights in the same manner as provided in Section 2 of this Article VIII and to have accepted the adverse recommendation or decision involved, and the same shall thereupon become and remain in effect as provided in said Section 2.

D. Postponement of hearings beyond the time set forth in these Bylaws shall be made only with the approval of the Ad Hoc hearing committee. Granting of such postponements shall only be for good cause shown and in the sole discretion of the hearing committee.

E. The affected practitioner shall be entitled to be accompanied by and/or represented at the hearing by a member of the Medical Staff in good standing or by a member of his local professional society.

F. Either a hearing officer, if one is appointed, or the Chairman of the hearing committee or his designee shall preside over the hearing to determine the order of procedure during the hearing, to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence, and to maintain decorum.

G. The hearing need not be conducted strictly according to rules of law relating to the examination of witnesses or presentation to evidence. Any relevant matter upon which responsible persons customarily rely in the conduct of serious affairs shall be considered, regardless of the existence of any common law or statutory rule which might make evidence inadmissible over objection in civil or criminal action. The practitioner for whom the hearing is being held shall, prior to or during the hearing, be entitled to submit memoranda concerning any issue of procedure of fact, and such memoranda shall become a part of the hearing record.

H. The Medical Executive Committee, when its action has prompted the hearing, shall appoint one of its members or some other Medical Staff member to represent it at the hearing, to present the facts in support of its adverse recommendation and to examine witnesses. The Board of Trustees, when its action has prompted the hearing, shall appoint one of its members to represent it at the hearing, to present the facts in support of its adverse decision and to examine witnesses. It shall be the obligation of such representative to present appropriate evidence in support of the adverse recommendation or decision, but the affected practitioner shall

thereafter be responsible for supporting his challenge to the adverse recommendation or decision by an appropriate showing that the charges or grounds involved lack any factual basis or that such basis or any action based thereon is either arbitrary, unreasonable or capricious.

I. The affected practitioner shall have the following rights: to call and examine witnesses, to introduce written evidence, to cross-examine any witness on any matter relevant to the issue of the hearing, to challenge any witness and to rebut any evidence. If the practitioner does not testify in his own behalf, he may be called and examined as if under cross-examination. The hearing committee may order that oral evidence be taken only on oath or affirmation administered by any person entitled to notarize documents in the State of Hawaii where the hearing is held.

J. The hearings provided for in these Bylaws are for the purpose of resolving, on an intra-professional basis, matters bearing on professional competence and conduct. Accordingly, neither the affected practitioner, nor the Medical Executive Committee nor the Board of Trustees, shall be represented at any phase of the hearing procedure by an attorney at law unless the hearing committee, in its discretion, permits both sides to be represented by counsel. The foregoing shall not be deemed to deprive the practitioner, the Medical Executive Committee or the Board of Trustees of the right to legal counsel in connection with preparation for the hearing or for a possible appeal; and, if a hearing officer is utilized, he may be an attorney at law.

K. The hearing committee may, without special notice, recess the hearing and reconvene the same for the convenience of the participants or for the purpose of obtaining new or additional evidence or consultation. Upon conclusion of the presentation of oral and written evidence, the hearing shall be closed. The hearing committee may thereupon, at a time convenient to itself, conduct its deliberations outside the presence of the practitioner for whom the hearing was convened.

L. Within fifteen (15) days after the final adjournment of the hearing, the hearing committee shall make a written report and recommendation and shall forward the same together with the hearing record and all other documentation to the Medical Executive Committee or the Board of Trustees, whichever appointed it. The report may recommend confirmation, modification or rejection

of the original adverse recommendation of the Medical Executive Committee or decision of the Board of Trustees. The Medical Executive Committee or Board of Trustees, whichever initiated the hearing, shall render a decision within fifteen (15) days. The Chief Executive Officer is charged with the responsibility of promptly notifying the affected practitioner of this decision.

SECTION 6. APPEAL TO THE BOARD OF TRUSTEES

A. Within ten (10) days after receipt of a notice by an affected practitioner of an adverse recommendation or decision made or adhered to after a hearing as above provided, he may, by written notice to the Board of Trustees, delivered through the Chief Executive Officer by certified mail, return receipt requested, request an appellate review by the Board of Trustees. Such notice may request that the appellate review be held only on the record on which the adverse recommendation or decision is based, as supported by the practitioner's written statement provided for below or may also request that oral argument be permitted as part of the appellate review.

B. If such appellate review is not requested wthin ten (10) days, the affected practitioner shall be deemed to have waived his right to the same and to have accepted such adverse recommendation or decision, and the same shall become effective immediately as provided in Section 2 of this Article VIII.

C. Within twenty-two (22) days after receipt of such notice of request for appellate review, the Board of Trustees shall schedule a date for such review, including a time and place for oral argument if such has been requested, and shall, through the Chief Executive Officer, by certified mail, return receipt requested, notify the affected practitioner of the same. The date of the appellate review shall not be less than seven (7) days, nor more than twenty-two (22) days from the date of receipt of the notice of request for appellate review, except that when the practitioner requesting the review is under a suspension which is then in effect, such review shall be scheduled as soon as arrangements for it may reasonably be made, but not more than thirty (30) days from the date of receipt of such notice.

D. The appellate review shall be conducted by the Board of Trustees or by a duly appointed appellate review committee of the Board of Trustees of not less than seven (7) members.

E. The affected practitioner shall have access to the report and

record (and transcription, if any) of the Ad Hoc hearing committee and all other material, favorable or unfavorable, that was considered in making the adverse recommendation or decision against him. He shall have 15 days to submit a written statement in his own behalf in which those factual and procedural matters with which he disagrees, and his reasons for such disagreement, shall be specified. This written statement may cover any matters raised at any step in the procedure to which the appeal is related, and legal counsel may assist in its preparation. Such written statement shall be submitted to the Board of Trustees through the Chief Executive Officer, by certified mail, return receipt requested, at least 7 days prior to the scheduled date for the appellate review. A similar statement may be submitted by the Medical Executive Committee or by the chairman of the hearing committee appointed by the Board of Trustees, and if submitted, the Chief Executive Officer shall provide a copy thereof to the practitioner at least 7 days prior to the date of such appellate review by certified mail, return receipt requested.

F. The Board of Trustees or its appointed review committee shall act as an appellate body. It shall review the record created in the proceedings and shall consider the written statements submitted pursuant to subparagraph E of this Section 6 for the purpose of determining whether the adverse recommendation or decision against the affected practitioner was justified and was not arbitrary or capricious. If oral argument is requested as part of the review procedure, the affected practitioner shall be present at such appellate review, shall be permitted to speak against the adverse recommendation or decision, and shall answer questions put to him by any member of the appellate review body. The Medical Executive Committee or the Board of Trustees, whichever is appropriate, shall also be represented by an individual who shall be permitted to speak in favor of the adverse recommendation or decision and who shall answer questions put to him by any member of the appellate review body.

G. New or additional matters not raised during the original hearing or in the hearing committee report, nor otherwise reflected in the record, shall only be introduced at the appellate review under unusual circumstances, and the Board of Trustees or the committee thereof appointed to conduct the appellate review shall, in its sole discretion, determine whether such new matters shall be accepted.

H. If the appellate review is conducted by the Board of Trustees, it may affirm, modify or reverse its prior decision or, in its discretion, refer the matter back to the Medical Executive Committee for further review and recommendation within 30 days. Such referral may include a request that the Medical Executive Committee arrange for a further hearing to resolve specified disputed issues.

I. If the appellate review is conducted by a committee of the Board of Trustees, such committee shall, within ten (10) days after the scheduled or adjourned date of the appellate review, either make a written report recommending that the Board of Trustees affirm, modify or reverse its prior decision, or refer the matter back to the Medical Executive Committee for further review and recommendation. The Medical Executive Committee shall accomplish its review and recommendations within thirty (30) days. Such referrals to the Medical Executive Committee may include a request that it arrange for a further hearing to resolve disputed issues. Within ten (10) days after receipt of such recommendation after referral, the committee of the Board of Trustees shall make its recommendation to the Board of Trustees as above provided.

J. The appellate review shall not be deemed to be concluded until all of the procedural steps provided in this Section 6 have been completed or waived. Where permitted by the Hospital Bylaws, all action required of the Board of Trustees may be taken by a committee of the Board of Trustees duly authorized to act.

SECTION 7. FINAL DECISION BY THE BOARD OF TRUSTEES

A. Within fifteen (15) days after the conclusion of the appellate review, the Board of Trustees shall make its final decision in writing in the matter and shall send notice thereof to the Medical Executive Committee and, through the Chief Executive Officer, to the affected practitioner by certified mail, return receipt requested. If this decision is in accordance with the Medical Executive Committee's last recommendation in the matter, it shall be immediately effective and final, and shall not be subject to further hearing or appellate review. If this decision is contrary to the Medical Executive Committee's last such recommendation, the Board of Trustees shall refer the matter to the Joint Conference Committee for further review and recommendation within thirty (30) days, and shall include in such notice of its decision a statement that a final decision will not be made until after receipt

of the Joint Conference Committee's recommendation. The Board of Trustees shall make its final decision with like effect and notice as first above provided in Section 7.

B. Not withstanding any other provision of these Bylaws, no practitioner shall be entitled as a right to more than one hearing and one appellate review on any matter which shall have been the subject of action by the Medical Executive Committee or by the Board of Trustees or by a duly authorized committee of the Board of Trustees or by both.

Exhibit D to Children's Hospital, et al.'s Motion for Summary Judgment

AUTHORIZATION FOR RELEASE OF INFORMATION

I agree to abide by the Medical Staff Bylaws, Rules and Regulations of Kauikeolani Children's Hospital as now existing and authorize the Hospital to investigate and review my qualifications for the purpose of appointment to the staff or renewal of privileges.

I further authorize any individual and/or organization to release any information requested by Kauikeolani Children's Hospital, including records and documents, which may bear on my qualifications. In so doing, I hereby release Kauikeolani Children's Hospital and any individual or organization from liability arising out of or relating to the disclosure of such information or to any action taken by them or their agents in good faith and without malice, in connection with my appointment to the staff or renewal of my staff privileges. Photocopies of this document will be as binding as the original.

/S/Than Tun M.D.

Date: June 15, 1982

Exhibit E to Children's Hospital, et al.'s Motion for Summary Judgment

KAPIOLANI-CHILDREN'S MEDICAL CENTER

MESSAGE

TO Than Tun, M.D.

DATE June 23, 1982

TEMPORARY PRIVILEGES IN ANESTHESIOLOGY

As per the attached memo, Temporary Privileges have been approved effective immediately through approximately early September.

Newborn anesthesia and cardiovascular anesthesia privileges are not approved at this time, pending receipt of documentation of training/experience in those areas.

Attached are Anesthesia Guidelines plus Surgical Observer information sheets. Also, a Pharmacy signature card, which you should complete and return as soon as possible.

Michiko Chinen, KCH Medical Staff Office

REPLY

DATE June 28, 1982

Dear Michiko Attached is a signed pharmacy signature card and thanks for your communication so quickly.

Please convey my thanks to Dr. Hattori, Dr. Chung, Dr. Mitsunaga, Dr. Shim and Mr. Cook.

Sincerely,

/S/ Than Tun, M.D.

Exhibit F to Children's Hospital, et al.'s Motion for Summary Judgment

KAUIKEOLANI CHILDREN'S HOSPITAL

Kapiolani/Children's Medical Center

MEMORANDUM

TO:	Admissions	Emergency Room
	Medical Records	Nursing (5)
	Pediatric Operative Services	Dr. Sherrel Hammar, Chief of Pediatrics
	Pharmacy	Chief Pediatric Resident
	KCH Medical Staff Office	Utilization Review Coordinator
	KH Medical Staff Office	Word Processing Center
	Administration	Credentials Committee
	Lab/Pathology	Radiology

FROM: Children's Medical Staff Office (x632)

DATE: June 16, 1982

SUBJECT: *TEMPORARY PRIVILEGES—Children's*

We, the undersigned, have examined this application for Temporary Privileges and find all in order.

/S/ Mitsuo Hattori Date 6-16-82

/S/ Stanley Chung Date 6-18-82

Chief of Service

/S/ W. Shim Date 6/23/82

Chief of Staff

/S/ Paul E. Cook Date 6/23/82

President

Temporary Privileges in ANESTHESIOLOGY, Special Clinical Services, are being extended to the following physician effective immediately and through September, 1982, when Board approval of Provisional Privileges can be expected—NOT INCLUDING NEWBORN ANESTHESIA OR CARDIOVASCULAR ANESTHESIA:

THAN TUN, M.D., Anethesiologist, with observation
600 Kapiolani Boulevard, Suite 203
Honolulu, Hawaii 96813
Phone 521-7427

Exhibit G to Children's Hospital, et al.'s Motion for Summary Judgment

Excerpts from the SURGICAL EXECUTIVE COMMITTEE meeting, July 2, 1982

REACTIVATION OF PROVISIONAL PRIVILEGES: THAN TUN, M.D., Anesthesiologist.

Temporary Privileges for Dr. Tun were recently approved by Drs. Hattori, Chung and Shim; however, approval of Dr. Tun's request for newborn and cardiovascular anesthesia privileges was denied, pending submission of documentation of training/experience in those areas. Dr. Hattori reviewed Dr. Tun's previous credential file in which his residency chief had not recommended privileges in newborn or cardiovascular anesthesia. Members were informed that Dr. Tun was previously observed for three non-newborn anesthesia cases at Children's in 1977.

*ACTION: MEMBERS AGREED TO RECOMMEND PROVISIONAL PRIVILEGES FOR DR. TUN BUT NOT INCLUDING NEWBORN AND CARDIOVASCULAR ANESTHESIA, as discussed above. Members further agreed that Dr. Tun submit only two more observed anesthesia cases (for a total of five), with newborn and cardiovascular anesthesia privileges to be considered later.

Exhibit H to Children's Hospital, et al.'s Motion for Summary Judgment

CASES PERFORMED HERE SINCE GRANTING OF TEMPORARY PRIVILEGES ON JUNE 23, 1982

1. *7/3/82, observed by Dr. Mitsuo Hattori.*
   Age = approx. 7½ years.
   Difficult to judge perfomance from a very short procedure like this.
2. *7/3/82, observed by Dr. Efren Baria.*
   Age = approx. 18 years.
   Induction and maintenance good, no anesthetic complications.
3. *7/7/82, observed by Dr. Mitsuo Hattori.*
   Age = 4½ years.
   Operation = meatotomy. Patient has several episodes of croup and upper airway obstruction. Anesthetic Technique: Mask induction, maintenance. Had mild laryngospasm, bradycardia. None of medications were prepared. Atropine was attempted to be given per right jugular without success. Finally given by observer per hand vein.
   Operating Room Deportment: Sleepy.
   Remarks: Poor preparation. No muscle relaxants or atropine were prepared in syringes.
4. *7/7/82, observed by Dr. Mitsuo Hattori.*
   Age = 6¾ years.
   Preop Dx = umbilical hernia. Surgery cancelled because of cardiac arrest.
   Anesthetic Used: N20-halothane. S.C.C.
   General anesthesia needed.
   Anesthetic Technique: Induction under mask with high concentration of Halothane with N20, laryngospasm, bradycardia and PVC's (PVC's warned by observer). IV started by CRNA. Initial intubation failed (esophageal intubation). S.C. was given without Atropine—further bradycardia. Intubation with some delay. Patient cyanotic, then ventricular fibrillation. Observer initiated CPR immediately (Dr. Tun was not quite aware of the situation). NaHC03 given. Defibrillation accomplished by observer. Pupils were dilated after successful defibrillation; reacted to light sluggishly. ABG drawn by observer (WNL by then). No medications were drawn in

syringes. I don't think that he should be doing any pediatric cases in this hospital unless he seeks further training elsewhere.

Exhibit I to Children's Hospital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL

Certified Mail

Return Receipt Requested

July 9, 1982
Than Tun, M.D.
600 Kapiolani Blvd., #203
Honolulu, Hawaii 96813
Dear Dr. Tun:

Upon the recommendation of the Chief of Surgery of Kauikeolani Children's Hospital, your Temporary Privileges in Anesthesiology have been terminated, effective immediately. This action has been taken in the best interest of patient care in view of two unacceptable anesthetic cases performed at Children's Hospital.

Under Article VII, Section 2, you are entitled to request that the Medical Executive Committee hold a hearing on this matter. You have thirty days following the date of receipt of this notice to submit a written request for a hearing. Failure to request a hearing within the specified time period shall constitute a waiver of your right to same.

During the period of your summary suspension, you are not permitted to schedule or administer anesthesia to pediatric patients at Children's Hospital. Should you have any questions in this regard, please feel free to call me at your convenience.

Sincerely,
Paul E. Cook
Executive Vice-President
for Richard Davi, President

cc: Walton K.T. Shim, M.D.
Chief of Staff, KCH
Stanley M.K. Chung, M.D.
Chief of Surgery, KCH

Exhibit J to Children's Hosital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL
July 9, 1982
Mr. Richard Davi, President
Kapiolani/Children's Medical Center
1319 Punahou Street
Honolulu, HI 96826
Dear Mr. Davi:

Dr. Than Tun has been on provisional status since June 23, 1982 with Temporary Privileges in the Division of Anesthesia—with observation and not including newborn or pediatric cardiovascular anesthesia.

Two observed anesthetic procedures by Dr. Tun were performed in the KCH Operating Rooms on July 7, 1982. The first involved poor preparation of necessary medications prior to administration of anesthesia and Dr. Tuns's unawareness of the patient's problem with upper airway. For the second case, regardless of prior warning by the observer, Dr. Tun began anesthetic induction without properly-prepared necessary medications, was unable to provide adequate ventilation and endotracheal intubation, and without even having started intravenous fluids. IV was started by the CRNA upon the strong recommendations of the observer. By then the patient started to show cardiac arrthymias. Again, Dr. Tun was not quite aware of this serious situation. Finally, the patient was intubated. However, the patient was having ventricular fibrillation. Under the circumstances, the dying patient in hand, the observer took over cardiopulmonary resuscitation and defibrillation. The observer ordered that surgery be cancelled, and the patient was transferred to the Pediatric Intensive Care Unit.

Accordingly, I would recommend that his Temporary Privileges be terminated at this time and no further privileges granted at this hospital.

Sincerely,
Stanley M.K. Chung, M.D.
Chief of Surgery
cc: Mitsuo Hattori, M.D., Chief of Anesthesia
Walton K.T. Shim, M.D., Chief of Staff

Exhibit K to Children's Hospital, et al.'s Motion for Summary Judgment

Excerpts form the CREDENTIALS COMMITTEE meeting minutes of July 13, 1982

APPLICATION FOR PROVISIONAL PRIVILEGES IN ANESTHESIOLOGY: THAN TUN, M.D.

As mentioned earlier, Temporary Privileges for Dr. Tun were terminated last week. A copy of the Chief of Surgery's request to the Chief Executive Officer that Dr. Tun's Temporary Privileges be terminated was available for review; that letter also requested that no further privileges be granted Dr. Tun at this hospital. It was pointed out that this special action took place subsequent to the SEC's recommendation that Dr. Tun be granted Provisional Privileges.

*ACTION: MEMBERS AGREED TO REVERSE THE SURGICAL EXECUTIVE COMMITTEE'S RECOMMENDATION TO APPROVE PROVISIONAL PRIVILEGES IN ANESTHESIOLOGY FOR DR. TUN; NO PRIVILEGES ARE RECOMMENDED FOR DR. TUN.

Exhibit L to Children's Hospital, et al.'s Motion for Summary Judgment

Excerpts from the CHILDREN'S MEDICAL EXECUTIVE COMMITTEE meeting minutes of July 27, 1982

d. SURGICAL EXECUTIVE COMMITTEE, *7/2/82*. Dr. Chung provided members with background information related to termination of Dr. Than Tun's temporary privileges in anesthesiology earlier this month and Credentials Committee's recommendations against granting him any privileges at Children's Hospital. The Credentials Committee had reversed the SEC's prior approval of provisional privileges for Dr. Tun. Dr. Chung also presented Anesthesia Guidelines for MEC approval.

ACTION: MEC MEMBERS AGREED TO REJECT DR. TUN'S APPLICATION FOR PROVISIONAL PRIVILEGES IN ANESTHESIOLOGY. The Board members will be informed of this adverse recommendation, and Dr. Tun will be notified of his right to a hearing before a medical staff committee.

Exhibit M to Children's Hospital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL

Certified Mail

Return Receipt Requested

July 28, 1982
Than Tun, M.D.
600 Kapiolani Boulevard, #203
Honolulu, HI 96813
Dear Dr. Tun:

The Medical Executive Committee of Kauikeolani Children's Hospital, upon recommendations of the Credentials Committee, will be recommending to the Board of Trustees that your application for medical staff membership and clinical privileges at Children's Hospital be rejected.

In accordance with Article V, Section 2, and Article VIII of the Medical Staff Bylaws, you are entitled to request a hearing to discuss this matter before an Ad Hoc committee of the Medical Staff. You shall have fifteen (15) days following the date of receipt of this notice to submit a written request for such a hearing. Failure to request a hearing within this specified time period shall constitute a waiver of your right to same.

Sincerely,
Paul E. Cook, Executive Vice-President
for Richard Davi, President

Exhibit N to Children's Hospital, et al.'s Motion for Summary Judgment

Date August 13, 1982

Stanley M.K. Chung, M.D.
Chief of Surgery,
Kapiolani/Children's Medical Center.
(Childrens Hospital)
1319 Punahou St., Honolulu, Hawaii, 96826.

Re: Application of Temporary Privileges in Children's Hospital.

Dear Dr. Chung,

Thank you for your letter dated July 28, 82. Much as I like to have privileges in your hospital, (Childrens,) however I have sufficient work in other hospitals, that I don't find it necessary to avail myself of your facilities, at this point of time.

Sincerely,
/S/ Than Tun, M.D.
One Kapiolani Building,
600 Kapiolani Blvd, Suite 203
Honolulu, Hawaii, 96813

Exhibit O to Children's Hospital, et al.'s Motion for Summary Judgement

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL
September 30, 1982
Than Tun, M.D.
600 Kapiolani Boulevard, #203
Honolulu, HI 96813
Dear Dr. Tun:

The Board of Trustees of Kauikeolani Children's Hospital, upon recommendations of the Medical Executive Committee, rejected your application for medical staff membership and clinical privileges and Children's Hospital. This action was taken following receipt of your letter of August 13th to Dr. Stanley Chung, Chief of Surgery, in which you waived your right to a hearing following notification of the Medical Executive Committee's recommendations in July.

Regretfully,
Richard Davi
President

Exhibit P to Children's Hospital, et al.'s Motion for Summary Judgement

October 14, 1982.

Mr. Richard Davi
President & Chief Executive Officer
Kapiolani/Children's Medical Center
1319 Punahou Street
Honolulu, Hawaii 96826
Dear Mr. Davi:

I am writing on behalf of Dr. Than Tun and this is to acknowledge receipt of your letter to him dated September 30th 1982. Dr. Tun is my client and he has requested me to answer your letter. First of all, we would like to refer you to Dr. Tun's letter dated August 13, 1982, saying that he didn't find it necessary to avail himself of your facilities at the time of the letter. This means that he was in effect, not pursuing his application for anesthesia privileges in your hospital. He was not pursuing his application, therefore, he was not availing of any right of hearing whatsoever. We would like to make it clear that contrary to your interpretation of Dr. Tun's letter of August 13, 1982, he never waived any right to any hearing. It would seem that your Chief of Surgery, Dr. Stanley Chung has misjudged the professional competence of my client. Whether this was merely based on insufficient or inaccurate facts or whether it was based on pure prejudice, I have advised my client not to dispute anything simply because the chief of surgery and for that matter, any executive committee, is not the proper forum to pass upon the professional competence of Dr. Than Tun. Suffice it to say that we don't agree to the myopic observations of Dr. Stanley Chung, we would not insult ourselves by going down into a petty discussion with him of a totally unnecessary exercise of medical rhetoric. Surprisingly, there were no concrete incidence of complaints from the patient that Dr. Tun was involved with and yet Dr. Chung seem to have raised so much fuss over the whole situation. For the record, we view this as totally unscrupulous and it raises the ethical question of whether Dr. Chung had every right to engaged in any type of judgement on my client. What we know is that there was no concrete case of malpractice or any type of allegation of recklessness against Dr. Than Tun.

Suffice it to say, at this point, nay without much argument, that your decision is purely an administrative matter and we neither subscribe, but certainly disagree the basis upon which such recommendations have been reached.

Again, we would want to reiterate our stand that there was no waiver of a right to a hearing and that we have not pursued our application with your hospital and therefore, my client has never been rejected by your executive committee.

Should you have any question on the foregoing, please do not hesitate to give me a call.

Very truly yours,

GUILLERMO M. CANLAS

cc: Dr. Than Tun

Exhibit Q to Children's Hospital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL

Certified Mail

Return Receipt Requested

December 20, 1982
Than Tun, M.D.
600 Kapiolani Boulevard, #203
Honolulu, HI 96813
Dear Dr. Tun:

In accordance with the Medical Staff Bylaws, Article V, Section 2, D-1, b-2, you are entitled to an appellate review by the Board of Trustees in view of its action taken on your application for medical staff membership and privileges in September, 1982. Although it could be implied from your letter of August 13, 1982 that you do not wish an appellate review, you are hereby notified that, if you do so wish, the prior decision of the Board will be withdrawn to permit appellate review and a new decision by the Board.

You shall have fifteen (15) days following receipt of this notice to submit a written request for such an appellate review. Failure to request a review within this specified time period shall constitute a waiver of your right to same.

Sincerely,
Richard Davi
President

Exhibit R to Children's Hospital, et al.'s Motion for Summary Judgment

January 3, 1982

Mr. Richard Davi
President & Chief Exec. Officer
Kapiolani/Children's Medical Center
1319 Punahou Street
Honolulu, Hawaii 96826

Re: *Dr. Than Tun*

Dear Mr. Davi:.

This is to acknowledge receipt of your letter dated December 20, 1982 addressed to Dr. Tun. I am acknowledging said letter on his behalf. We have thought that you understand that Dr. Tun has requested me to represent him in the matter of his application of privileges at your hospital and that we have expressed such representation in my letter of October 14, 1982. I refer you further to the letter of you counsel, Mr. William Goebert, Jr., Esq. A copy of his letter is enclosed for your reference. Please note that Mr. Goebert wrote that "the hospital or myself will be communicating with you within the next three weeks:, the work "you," meaning to Dr. Tun's counsel and not to Dr. Tun himself. I must insist that you follow certain rules of consistency.

Also, since Dr. Tun is represented by counsel, any direct communication to him by the opposite party's counsel or his extension can be properly done so only upon my permission. Next time you communicate directly to my client, we shall view it as a breach of professional responsibility and a sign of bad faith. I am writing this letter directly to you (copy furnished Mr. Goebert) only because your counsel has expressed tacitly that I may do so. If it is otherwise, please let me know. The hospital may continue communicating with me at your option.

Regarding your offer that Dr. Than Tun be given fifteen days from receipt of your letter to submit a written request for an appellate review, Dr. Tun would like to have some time to study it, your proposal coinciding with the holidays. We suggest that we be given up to next week, until January 14, to respond to your letter without counting the fifteen day period except from that date.

If you or your counsel have any question in the meantime, please do not hesitate to communicate with me.

Very truly yours,
GUILLERMO M. CANLAS

cc: Dr. Than Tun
Mr. H. William Goebert, Jr.

Exhibit S to Children's Hospital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL
March 10, 1983

Certified Mail

Return Receipt Requested

Than Tun, M.D.
94-166 Kiaha Loop
Mililani, Hawaii 96789
Dear Dr. Tun:

The Board of Trustees of Kauikeolani Children's Hospital has upheld the Medical Executive Committee's prior recommendations concerning your application for medical staff membership and privileges. This action was taken following non-receipt of a written request from you for an appellate review by the Board of Trustees following our notification to you in December, 1982. Accordingly, you are deemed to have waived your right to such appellate review and to have accepted rejection of your application for medical staff membership and privileges in Anesthesiology at Kauikeolani Children's Hospital.

As provided in the Medical Staff Bylaws, Article VIII, Section 7, B, you are entitled to no further hearings or appellate review on this matter.

Sincerely,
Richard Davi President

APPENDIX H

Silver v. Castle Memorial Hospital,
53 Haw. 475, 497 P.2d 564 (1972),
cert. denied, 409 U.S. 1048 (1972),
reh. denied, 409 U.S. 1131 (1973)

SUPREME COURT OF HAWAII

Syllabus

MAURICE L. SILVER, M.D., Plaintiff-Appellant, *v.* CASTLE MEMORIAL HOSPITAL, a Hawaii non-profit corporation, et al., Defendants-Appellees

No. 4998

APPEAL FROM FIRST CIRCUIT COURT
HONORABLE TOM OKINO, JUDGE

May 24, 1972

RICHARDSON, C.J., ABE, LEVINSON AND KOBAYASHI, JJ., AND CIRCUIT JUDGE VITOUSEK IN PLACE OF MARUMOTO, J., DISQUALIFIED

OPINION OF THE COURT BY KOBAYASHI, J.

Appellant, Dr. Silver, a neurosurgeon, appeals from the judgment of the trial court granting directed verdicts in favor of appellees. The trial court found in favor of appellees, defendants below, on all counts alleged by appellant, including a conspiracy in violation of antitrust laws of the State of Hawaii, a common law conspiracy to monopolize and restrain competition, defamation by certain individual appellees, and an injunction against appellee, Castle Memorial Hospital,

compelling them to permit appellant to use their facilities.

For an adequate disposition of this case the facts need be simply stated.

Appellant first applied for staff privileges at appellee hospital in 1963. After having been given a hearing, appellant's application was denied. In 1965 appellant reapplied for privileges and in 1966 the appellee's hospital board of trustees granted appellant temporary surgery privileges for one year under observation by other doctors. At the close of the probationary period an investigation was conducted into the performance of appellant. The hospital board, acting with recommendation of the committee that had conducted the investigation, decided not to renew appellant's staff privileges. Appellant was granted a hearing and at that time, for the first time, was confronted with the allegations against him and given an opportunity to make an explanation. The earlier decision to deny privileges was upheld.

We find appellant's allegations of conspiracy, defamation, and antitrust violations to be without merit and as to those issues the judgment of the trial court is affirmed. Appellant is not left, however, without a viable claim against appellee Castle Memorial Hospital. This case presents the issue of whether the administrative decision of a private hospital in refusing to grant licensed doctors staff privileges is subject to judicial review.[1] This question has been decided in other jurisdictions on the basis of two distinctly divergent views.

JUDICIAL REVIEW OF PRIVATE HOSPITAL

The majority of jurisdictions have held that a private hospital, as opposed to a public hospital, has the absolute

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[1]The immediate issue has been the subject of much recent law review commentary. *E.g.*, Herring, *Hospital Privileges*, 14 CLEV.-MAR. L. REV. 472 (1965); Southwick, *Hospital Medical Staff Privileges*, 18 DE PAUL L. REV. 655 (1969); Note, *Denial of Hospital Staff Privileges: Hearing and Judicial Review*, 56 IOWA L. REV. 1351 (1971); Note, *Expulsion and Exclusion from Hospital Practice and Organized Medical Societies*, 15 RUTG. L. REV. 327 (1961); Note, *Hospital Staff Privileges: The Need for Legislation*, 17 STAN. L. REV. 900 (1965); Note, *The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy*, 1966 WASH. U.L.Q. 485.

right to exclude any physician from practicing therein. Such a decision of a private hospital board has been held not subject to judicial review,[2] unless the hospital has failed to conform to its own procedural requirements as set forth in its constitution, by-laws, or rules and regulations. The rationale of the majority position has been aptly set forth in *Shulman v. Washington Hospital Center*, 222 F. Supp. 59, 64 (D.D.C. 1963).

> There are sound reasons that lead the courts not to interfere in these matters. Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities. The authorities of a hospital necessarily and naturally endeavor to their utmost to serve in the best possible manner the sick and the afflicted who knock at their door. Not all professional men, be they physicians, lawyers, or members of other professions, are of identical ability, competence, or experience, or of equal reliability, character, and standards of ethics. The mere fact that a person is admitted or licensed to practice his profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose. Necessarily

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[2]Moore v. Andalusia Hosp., Inc., 284 Ala. 259, 224 So.2d 617 (1969); Edson v. Griffin Hosp., 21 Conn. Supp. 55, 144 A.2d 341 (1958); West Coast Hosp. Ass'n v. Hoare, 64 So.2d 293 (Fla. 1953); Mauer v. Highland Park Hosp. Foundation, 90 Ill. App. 2d 409, 232 N.E.2d 776 (1967); Natale v. Sisters of Mercy of Council Bluffs, 243 Iowa 582, 52 N.W.2d 701 (1952); Hughes v. Good Samaritan Hosp., 289 Ky. 123, 158 S.W.2d 159 (1942); Clark v. Physicians and Surgeons Hosp., Inc., 121 So.2d 752 (La. Ct. App. 1960); Glass v. Doctors Hosp., Inc., 213 Md. 44, 131 A.2d 254 (1957); Akopiantz v. Board of County Comm'rs, 65 N.M. 125, 333 P.2d 611 (1958); Leider v. Beth Israel Hosp. Ass'n, 11 N.Y.2d 205, 227 N.Y.S.2d 900, 182 N.E.2d 393 (1962); Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc., 395 Pa. 257, 149 A.2d 456 (1959); Hagan v. Osteopathic Gen. Hosp. of Rhode Island, 102 R.I. 717, 232 A.2d 596 (1967); Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App. 1920); Khoury v. Community Memorial Hosp., Inc., 203 Va. 236, 123 S.E.2d 533 (1962); Group Health Cooperative v. King County Medical Soc'y, 39 Wash.2d 586, 237 P.2d 737 (1951); State ex rel. Sams v. Ohio Valley General Hosp. Ass'n, 149 W.Va. 229, 140 S.E.2d 457 (1965); Johnson v. City of Ripon, 259 Wis. 84, 47 N.W.2d 328 (1951).

hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover not all professional men have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for selection. In matters such as these the courts are not in a position to substitute their judgment for that of professional groups.

The private status of a private hospital has been held to constitute sufficient justification for the existence of an absolute exclusionary right. *Edson v. Griffin Hospital*, 21 Conn. Supp. 55, 144 A.2d 341 (1958). It is reasoned that even though a doctor may have exemplary qualifications, he has no vested right to practice in a private hospital but merely a privilege which may be granted or denied at the election of the private corporation in exercising its fundamental right to manage its own internal affairs.[3]

We agree that the board of directors of a private hospital should have broad discretionary power in determining which doctors will be given staff privileges and on what basis. There are many justifications for such power aside from the general malpractice considerations. Apparently the state licensing procedure does not distinguish between general practitioners and specialists such as neurosurgeons. Nor does the state licensing system provide for adequate periodic review of a doctor's skill and performance, both of which are of primary importance to the beneficiaries of the services of the hospital

[3]Such a view may not today provide for an automatic nonreviewable exclusionary right, however. In cases involving discriminatory exclusionary practices, federal courts have ruled that when a private hospital has sufficient governmental involvement to constitute state action the federal constitutional standards of due process and equal protection are subject to violation. *E.g.*, Eaton v. Grubbs, 329 F.2d 710, 714-15 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 967 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Citta v. Delaware Valley Hosp., 313 F. Supp. 301, 307 (E.D. Pa. 1970).

and doctors involved, the patients themselves. When considering the interest of the patient, it is not enough that his doctor possess the necessary skills of his profession. The absence of a compatible team working together could impair the doctor's performance and consequently undermine the effectiveness of the treatment given the patient.[4] All of the above criteria are and should be weighed by the board in granting staff privileges. This staff privileges determination is, as a system, the general method utilized by hospitals throughout the country for screening and reviewing applicants in terms of qualifications, current skills, performance, personality and character.

We cannot agree, however, that the discretionary power of a hospital is absolute or that a decision of a private hospital board in refusing to grant a licensed doctor staff privileges is not subject to judicial review. The better rule[5] provides that such review be available as to whether the doctor excluded was afforded procedural due process, and as to whether an abuse of discretion by the hospital board occurred, resulting in an arbitrary, capricious or unreason-

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[4]It has been pointed out that "considerations of team spirit and cooperativeness can be as important as technical skill in recommendations for staff appointments; or, put another way, professional competence in hospital practice should, according to modern hospital theory, include qualities needed for cooperative staff work." Note, *Hospital Staff Privileges: The Need for Legislation*, 17 STAN. L. REV. 900, 905 (1965). The requirement that a doctor have a cooperative personality does not mean, however, that exclusion by a hospital board will be upheld for other than meritorious reasons. In this respect it has been held that "[a] denial of a physician's application upon the basis that his appointment will cause disharmony among the medical staff must be clearly and persuasively supported by the record. The record should also clearly and persuasively indicate that such prospective disharmony probably will have an adverse effect on patient care and not merely annoy or displease certain physicians and administrators." Sussman v. Overlook Hosp. Ass'n, 92 N.J. Super. 163, 182, 222 A.2d 530, 540 (1966).

[5]At present California, New Hampshire, New Jersey, Ohio and Vermont have held that the admissions decisions of private hospitals are subject to judicial review. Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal.2d 806, 810, 376 P.2d 568, 570, 26 Cal. Rptr. 640, 642 (1962); Bricker v. Sceva Speare Memorial Hosp., 281 A.2d 589, 592-93 (N.H. 1971); Greisman v. Newcomb Hosp., 40 N.J. 389, 402-03, 192 A.2d 817, 824-25 (1963); Davidson v. Youngstown Hosp. Ass'n, 19 Ohio App. 2d 246, 251, 250 N.E.2d 892, 896 (1969); Woodard v. Porter Hosp., Inc., 125 Vt. 419, 423, 217 A.2d 37, 40 (1966).

able exclusion. As to what constitutes such an abuse it has been held that "the managing authorities of a private hospital are vested with broad discretionary powers in the selection of its medical and surgical staffs. If the exclusion of a person from its medical or surgical staff is based on the sound and reasonable exercise of discretionary judgment, courts will not intervene, but if the exclusion stems from unreasonable, arbitrary, capricious or discriminatory considerations, equitable relief is available". *Davidson v. Youngstown Hospital Association*, 19 Ohio App.2d. 246, 251, 250 N.E.2d 892, 896 (1969).

The basis for this departure from the traditional rule was first voiced in *Greisman v. Newcomb Hospital*, 40 N.J. 389, 402-04, 192 A.2d 817, 824-25 (1963).

> [W]hile the managing officials [of a private hospital] may have discretionary powers in the selection of the medical staff, those powers are deeply imbedded in public aspects, and are rightly viewed, for policy reasons . . . as fiduciary powers to be exercised reasonably and for the public good.
>
> . . . .
>
> Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public. They must recognize that their powers, particularly those relating to the selection of staff members, are powers in trust which are always to be dealt with as such. While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked at the threshold to preclude an application for staff member-

ship, not because of any lack of individual merit, but for a reason unrelated to sound hospital standards and not in furtherance of the common good.

PUBLIC VERSUS PRIVATE HOSPITAL

At this point it is appropriate that we note the distinction that has been drawn in characterizing a hospital as a public or private institution. It has been recognized that the generally accepted view is that "a public hospital is an instrumentality of the state, founded and owned in the public interest, supported by public funds, and governed by those deriving their authority from the state. A private hospital is founded and maintained by private persons or a corporation, a state or municipality having no voice in the management or control of its property or the formation of rules for its government." *Woodard v. Porter Hospital, Inc.*, 125 Vt. 419, 422, 217 A.2d 37, 39 (1966). The principal distinguishing feature of a hospital that is characterized as being private is that it as an entity has the power to manage its own affairs and is not subject to the direct control of a governmental agency. *See Shulman v. Washington Hospital Center*, 222 F. Supp. 59, 61-62 (D.D.C. 1963); *Edson v. Griffin Hospital*, 21 Conn. Supp. 55, 144 A.2d 341, 344 (1958). Such a private identity is usually evidenced by the fact that under the hospital's charter or corporate powers granted, it has the right to elect its own board of officers and directors. It is this board in whom is placed, either expressly or impliedly, the discretionary power of granting staff privileges.

It is evident that recently some courts have recognized another hospital classification falling between that of public and private. Such a status can be termed "quasi public" as distinguished from a hospital that is truly private. *E.g.*, *Sussman v. Overlook Hospital Association*, 92 N.J. Super. 163, 168, 222 A.2d 530, 533 (1966), *aff'd*, 95 N.J. Super. 418, 231 A.2d 389 (1967). The "quasi public" status is achieved if what would otherwise be a truly private hospital was constructed with public funds,[6] is presently receiving

[6]Grants by the federal government are made to public and private hospitals

public benefits or has been sufficiently incorporated into a governmental plan for providing hospital facilities to the public.[7] It is not surprising that courts would be more readily willing to grant judicial review of a private hospital's administrative decision if it could be shown that the hospital in question was not a truly private institution. However, if the proposition that any hospital occupies a fiduciary trust relationship between itself, its staff and the public it seeks to serve is accepted, then the rationale for any distinction between public, "quasi public" and truly private breaks down and becomes meaningless, especially if the hospital's patients are considered to be of primary concern.

In holding that the actions of appellee hospital in this case are subject to judicial review we do not mean to characterize appellee as anything other than a private hospital. In relation to this point we are in concurrence with the reasoning that "a private nonprofit hospital, which receives part of its funds from public sources and through public solicitations, which receives tax benefits because of its nonprofit and nonprivate aspects and which constitutes a virtual monopoly in the area in which it functioned, is a 'private hospital' in the sense that it is nongovernmental, but that it is in no position to claim immunity from public supervision and control because of its private nature. The power of the staff of such a hospital to pass on staff membership applications is a fiduciary power which must be exercised reasonably

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for construction costs pursuant to the Hill-Burton Act, 42 U.S.C. § 291 (1965). Castle Memorial Hosp., appellee in this case, was the recipient of $533,225 of such federal funds, in addition to state funds.

[7]Some courts that have not in the past recognized the existence of these criteria as affecting the issue of judicial review are not doing so. In Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963), quoted earlier in this opinion for the rationale of the majority position, the court stated, in holding that the staff membership decisions of a private hospital are not subject to judicial review, that "the circumstance that [the hospital] was constructed with the aid of Government funds, as is the case in this instance, does not detract from its status as a private hospital." *Id.* at 61. Subsequently Shulman, on the basis of recent developing law in this area, sued the hospital again. Although the court in Shulman v. Washington Hosp. Center, 319 F. Supp. 252, 254-55 (D.D.C. 1970), held that the prior decision was *res judicata* as to Shulman's due process claim, it did recognize the significance of governmental involvement.

and for the public good." *Davidson v. Youngstown Hospital Association*, 19 Ohio App. 2d 246, 250, 250 N.E.2d 892, 895 (1969).

In the case before us we need not reach the issue of whether the decision of the board of a truly private hospital not to grant staff privileges is subject to judicial review. As indicated previously, appellee hospital was the recipient of state and federal funding during its construction. Our opinion today, therefore, is limited to those situations where the hospitals involved have had more than nominal governmental involvement in the form of funding. We leave the issue as to what other forms of governmental-public involvement are sufficient to constitute a basis for judicial review and the issue as to whether a truly completely private hospital is subject to such review to future cases wherein those questions are more adequately briefed by the litigants involved.

PROCEDURAL DUE PROCESS—
REQUIREMENT OF A HEARING

Compliance with the principle that a doctor applying for

[T]he Washington Hospital Center is a "private" as distinct from a "public" institution, for the purposes of determining what sort of judicial review is applicable to its actions in managing its staff. *It is clear that this hospital does not have the close governmental ties, either financial or managerial, which would justify its being classified as public.* All of the cases cited by plaintiff to support its argument that defendants should be subject to constitutional standards of due process which require notice, hearing, stated reasons for dismissal, and the right of confrontation, involve hospitals which received substantial government aid for operation or construction, see Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Citta v. Delaware Valley Hospital, 313 F.Supp. 301 (E.D.Pa. 1970), and/or which were the only hospitals in the area, and thus acquired a quasi-public character, see Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33 (6th Cir. 1968); Burkhart v. Community Medical Center, 432 S.W.2d 433 (Ky.Ct.App. 1968); Foster v. Mobile County Hospital Board, 398 F.2d 227 (5th Cir. 1968). The Court holds that defendant Washington Hospital Center, as a private institution, has the right to remove members of its staff, free from judicial review, so long as its own regulations are followed as was done in this case. (Emphasis added.)

Apparently if the Shulman court had found sufficiently close governmental ties, and the *res judicata* issue had not been controlling, it would have classified the hospital as public and granted judicial review.

staff privileges at a private hospital, as well as at a public hospital, be afforded procedural due process requires a balancing process of the varying interests involved. The doctor has an interest in being able to pursue his profession which requires that the necessary facilities be available to him. The hospital is interested in preserving its autonomy and in maintaining quality control in its medical staff. The public's interest lies in the perpetuation of that quality control and, in the sense that its services are and remain available to those in need, in the productivity of the hospital.[8]

The purposes and interests of everyone concerned would be defeated if hospitals were required to engage in excessively burdensome procedures in screening staff applicants. However, due process, in this context, requires that a fair and thorough consideration be made of a doctor's application for initial appointment or reappointment to the staff. Therefore, a hearing before the deciding board must be provided. It is not possible that such a hearing require all the aspects of a formal judicial or quasi judicial hearing. Although a

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[8]Justice Abe concurring herein states that HRS § 453-8 (Supp. 1971) sets forth a "comprehensive scheme" to determine whether a physician continues to be competent. It should be pointed out that this statute does not provide for systematic periodic review of a doctor's skill and performance but merely provides for the revocation or suspension of a doctor's license. Inherent within the mechanics of HRS § 453 is the fact that it does not become operative until someone has accepted the burden of challenging a doctor's right to retain his license. Aside from other criteria that are not directly related to a doctor's competency as a physician, HRS § 453-8(12) provides that "professional misconduct or gross carelessness or manifest incapacity in the practice of medicine or surgery" are sufficient grounds for the state board of medical examiners to revoke or suspend a doctor's license. Under Justice Abe's view "no Hawaii hospital" could deny a licensed doctor privileges or refuse to renew his privileges regardless of whether the doctor was in fact too incompetent or incompatible to provide the quality of care the hospital board itself strives to maintain. The hospital board, in order to deny such a doctor privileges, would first have to wait until the doctor performed a particular act sufficient to constitute "gross carelessness" or the like in the eyes of the state board of medical examiners. Then the hospital board would have to initiate revocation of license proceedings and subsequently be successful in having the doctor's license revoked. The majority does not feel that it is either practically reasonable or legally sanctionable to impose such a burden on either what has been earlier characterized in this opinion as a truly private hospital or on a private hospital that has received government funds but has provided the applicant a valid hearing.

hospital board does not have the power to subpoena witnesses or administer oaths, certain procedural safeguards must be provided. The doctor should be on notice that a hearing is available to him. He should be given timely notification sufficiently prior to the hearing for him to adequately prepare a defense. In conjunction with such notice, a doctor whose privileges are being revoked or who is being denied reappointment should be provided a written statement of the charges against him. Such statement should be sufficiently adequate to apprise him of the specific charges against him. A doctor who is being denied initial appointment to a hospital staff should be provided a written statement specifying the reasons his application is being denied.

Because a hospital board has no subpoena power, there can be no right to confront and cross-examine persons who have made adverse statements of a doctor unless such persons testify at the hearing. However, a doctor should have the right to call his own witnesses.

It should be within the discretion of the hospital board as to whether counsel may attend the hearing and participate in the proceedings. Participation of counsel would probably not be necessary unless the hospital's attorney is used in the proceedings or the extreme nature of the charges involved indicated that representation by an attorney would be advantageous. Such a limitation would not preclude a doctor from consulting an attorney prior to the hearing even though the attorney was not allowed to participate in the hearing itself.

The basis for the decision of the board must come from substantial evidence which was produced at the hearing. As such the board cannot rely on *ex parte* communications that were not made known to the doctor in question. The utilization of such material would render ineffective the doctor's right to answer the charges upon which the denial of his staff privileges are based.

The decision of the board should be written, including the basis for the decision, thus providing a record for judicial review.

SUPREME COURT OF HAWAII

Opinion of the Court

DISPOSITION OF PRESENT CASE

In the present case appellant was granted staff privileges apparently on a probationary basis for a period of one year. At the end of that period it was decided that such privileges not be renewed. It is our opinion that appellant was not afforded procedural due process. Although a hearing was provided appellant, it was patently defective.

Presumably among the significant factors to be considered by a hospital board at a reappointment or revocation of privileges hearing would be included the previous performance of the doctor at the hospital. A year's time, as in this case, would appear to be a sufficiently long period for specific charges to develop against appellant if his denial of privileges were to be justified. And yet in this case, prior to the termination of appellant's privileges, appellant was never provided with specific written charges as to why his performance was not deemed acceptable. He was merely read an indictment of general allegations at the hearing. In order for appellant's right to a hearing to be effective he must have been apprised of the particulars of the specific claims against him prior to the hearing. In this case appellant had no opportunity to investigate the basis for his performance being questioned. As such his right to present a defense was rendered nugatory.

It is clear from the record of this case that the hospital board made its decision as to the renewal of appellant's privileges prior to the ineffective hearing granted appellant. Such a procedure cannot be considered satisfactory. A final decision to revoke privileges or not reappoint, made by the ultimate governing body, the hospital board, must come after the requisite hearing is provided. In order for the board to function as an objective decision making body in its capacity as grantor of staff privileges it must not be tainted by its own premature decisions prior to the hearing.

We do not reach the issue whether in this case the decision of the board, aside from the fact that the hearing was not adequate, was based on insubstantial evidence, resulting in an arbitrary, capricious or unreasonable exclusion amount-

ing to an abuse of discretion. Appellant clearly was denied procedural due process. Although this case is appealed from the decision of the court in the jury trial below, equitable relief having been prayed for, it is appropriate to grant such a remedy. Therefore this case is remanded for the trial court to grant an injunction against appellee, reinstating appellant with his temporary staff privileges.

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Richard Hirai (*Walter G. Chuck* and *Henry I. Kuba* on the brief; *Chuck & Fujiyama* of counsel) for defendant-appellee Great American Insurance Company.

CONCURRING OPINION OF ABE, J.

I begin with the propositions that acts of hospitals performing "public functions"[1] or receiving government funds are state action and that such hospitals are therefore subject to the requirements of the Due Process Clause and may deny a physician the liberty to practice medicine only if they have a rational basis for doing so and act pursuant to fair procedures.

I would hold that whenever a physician is in compliance with the requirements for licensing of the State Board of Medical Examiners, no Hawaii hospital subject to the Due

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[1]Marsh v. Alabama, 326 U.S. 501 (1946); Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Smith v. Allwright, 321 U.S. 649 (1944).

Process Clause may completely deny him the right to admit and treat patients.

In my opinion, there is little need to allow hospitals to set up committees empowered to deny staff privileges to licensed physicians. The licensing of physicians has been preempted by the State and adequate procedures are already established by statute to determine whether or not a physician continues to be competent. As I read our statutes, any hospital, doctor, or other interested person may institute proceedings under HRS § 453-8 (Supp. 1971) to have a physician's license revoked or partially revoked. The Board of Medical Examiners, a select committee of physicians appointed by the Governor, then determines whether a physician's license should be revoked or suspended. Chapter 453 contains the detailed procedural protections which the majority favors, such as notice, opportunity for a hearing, and a subpoena power for both the board and the physician, and it allocates the burden of proof to the hospital, as Justice Levinson desires. The fact that the legislature has established a comprehensive scheme to determine whether or not a physician continues to be competent indicates that there is little need to allow hospitals to make a second determination of whether or not a physician is competent.

Against the positive need for hospital supervision of the competence of physicians, I weigh the risks of giving such supervisory powers to hospitals. Whenever a hospital appoints a group of its doctors to a "credentials committee" and empowers them to supervise the competence of other doctors, there is a grave danger that the members of the committee will seek to exclude doctors because they are competitors, because they are Black, or Jewish, or Haole or Oriental, because they have testified against them in malpractice suits, or simply because they do not like them. Requiring a credentials committee to act out a charade of seemingly fair procedures does little to minimize the danger that the committee will draw its conclusion for reasons not present in the record and that danger exists regardless of where the burden of proof is allocated. The root problem

is that a credentials committee can never be expected to act with the disinterestedness of the Board of Medical Examiners.

Weighing the very marginal gains to be had by allowing hospitals to completely exclude licensed physicians against the risks attending the power, I conclude that hospitals that are subject to the Due Process Clause have no rational basis for excluding licensed physicians.

This resolution does not create a risk that a hospital will be liable for the negligence of its physicians, yet lack the capacity to exclude them. With the possible exception of one decision,[2] courts have always held that a hospital is not liable for the negligent acts of the physicians who are not employed by the hospital.[3] The ordinary physician is not the hospital's "servant" because the hospital has no "right to control" the acts of an "independent contractor." Since the hospital is not liable for the independent physician's negligence, it has no need to guarantee that he is competent.[4]

The danger that the hospital's admission of a physician to its staff will encourage patients to seek the services of a doctor who may be incompetent is also chimerical. Patients

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[2]Darling v. Charleston Community Memorial Hospital, 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964), *aff'd*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

[3]Moon v. Mercy Hospital, 150 Colo. 430, 373 P.2d 944 (1962); Cornelius v. Sinai Hospital of Baltimore, Inc., 219 Md. 116, 148 A.2d 567 (1959); Minogue v. Rutland Hospital, Inc., 119 Vt. 336, 125 A.2d 796 (1956); Keene v. Methodist Hospital, 324 F. Supp. 233 (D.C. Ind. 1971); Bulloch County Hospital Authority v. Fowler, 124 Ga. App. 242, 183 S.E.2d 586 (1971).

[4]Hospitals are, of course, liable for their own negligent acts, *South Highlands Infirmary v. Camp*, 180 So. 2d 904 (Ala. 1965); *Schuster v. St. Vincent Hospital*, 45 Wis. 2d 135, 172 N.W.2d 421 (1969); *Weeks v. Latter-Day Saints Hospital*, 418 F.2d 1035 (C.A. Utah, 1969), or for the negligence of interns, residents, emergency room physicians, and the like who are actually employed by the hospital. *New Biloxi Hospital, Inc. v. Frazier*, 245 Miss. 185, 146 So. 2d 882 (1962); *Bing v. Thunig*, 163 N.Y.S.2d 3, 2 N.Y.2d 656, 143 N.E.2d 3 (1957). Since salaried physicians are subject to the hospital's control, the doctrine of *respondeat superior* applies and the hospital has both a right and a duty to examine the competence of employees it hires on a salaried basis. A number of jurisdictions hold that a hospital is not liable for the acts of even a salaried physician, on the theory that, since medicine is a field of great expertise, hospitals have no "right to control" any doctor, salaried or not. *See e.g.*, Brown v. Moore, 143 F. Supp. 816 (W.D. Pa. 1956).

are admitted to hospitals only *after* they have chosen a doctor. Even in emergency rooms, patients are treated either by doctors in the employ of the hospital, or by a physician of their own choosing.

Nor do I see a danger that a single hospital will be flooded with excessive numbers of doctors and patients. It seems preferable to allocate facilities to those patients who are neediest or on a first-come, first-serve basis, rather than to allow arbitrary admission of patients of self-selected physicians.

This court should recognize that hospitals are not clubs. Incumbent doctors do not need the power to exclude newcomers. Licensed physicians ought to be able to freely admit patients to any hospital of the patient's choosing. Also, we should recognize the right of a patient to have a doctor of his own choice attend him and we should eliminate factors that may hamper or hinder such right.

I concur in the holding that it was error for the court to grant a directed verdict allowing the hospital to completely exclude Dr. Silver, and error to fail to grant an injunction restraining Castle Memorial Hospital and the members of its credentials committee from completely denying Dr. Silver the right to admit patients.

CONCURRING OPINION OF LEVINSON, J.

I join in the holding of the court that the decision of the governing body of Castle Memorial Hospital to revoke the appellant's staff privileges is subject to judicial review and that an injunction should issue reinstating him to the position which he occupied prior to the revocation proceeding. I also subscribe to the guidelines laid down in the opinion of the court restricting the administrative discretion of the hospital board and extending procedural protections to a physician whose staff privileges are at issue. I would, however, go further.[1]

I would hold in plain language that a physician licensed

[1] I understand my Brother Abe's position to be that all licensed physicians must be accorded staff privileges to practice in any public or quasi-public hospital, without regard to additional indicia of medical qualifications or performance. De-

by the State of Hawaii under HRS ch. 453 is presumed qualified to engage in the general practice of medicine. When a physician is in a specialty certified by the American Board of Medical Specialties, I would extend the presumption to that particular specialty. Thus, a hospital which has received public funds[2] would be required to grant the application for staff privileges of any board certified and/or licensed physician, unless it can adduce clear and convincing evidence that the physician lacks the requisite medical qualifications. I emphasize that the burden should be upon the hospital to adduce such evidence. I interpret the opinion of the court to be consistent with what I have said in this paragraph.

The hearing at which a physician's right to staff privileges is determined must comport with the dictates of due process. The physician may not be held to a more stringent standard of performance than are other staff members. In addition to timely notice and a written statement of the specific charges against him, I would hold that a physician is entitled to the representation of counsel and an opportunity to cross-examine all witnesses against him in all proceedings affecting his right to staff privileges. The conduct of an adequate defense is obviously impossible if the physician cannot confront and cross-examine adverse witnesses. A hospital's lack of subpoena power would not prevent the trier of fact from declining to consider evidence offered by a staff member who does not have the courage and willingness to subject himself to cross-examination.

I am satisfied from reading the entire record that Castle Memorial Hospital subjected Dr. Silver to a kafkaesque "kangaroo court," called at the eleventh hour in an effort to comply with the hospital's own by-laws and to rationalize a result which its board of trustees had already reached. Such proceedings are constitutionally intolerable.

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spite the appeal inherent in all absolutist positions, I believe that the respective interests of hospital, physician, and public are susceptible to more flexible reconciliation.

[2] I express no opinion as to the standard which should be applied to those hospitals which receive no public funds.